FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

SEPTEMBER 1987
Volume 9
No. 9

DECISIONS

09-30-87	NACCO Mining Company	LAKE 85-87-R
09-30-87	White County Coal Corporation	LAKE 86-58-R
09-30-87	Emerald Mines Corporation	PENN 85-298-R
09-30-87	Greenwich Collieries	PENN 85-188-R
09-30-87	Quinland Coals, Inc.	WEVA 85-169
09-30-87	Odell Maggard v. Chaney Creek Coal Corp.	KENT 86-1-D
*12-19-86	Garry Goff v. Youghiogheny & Ohio Coal Co.	LAKE 84-86-D

Administrative Law Judge Decisions

09-08-87	Sec. Labor for George Jones v. Dee Gold Mining Company	WEST 85-131-D
09-08-87	Neil Sprague	WEST 87-129-M
09-10-87	Paula L. Price v. Monterey Coal Co.	LAKE 86-45-D
09-15-87	Arnold Sharp v. Big Elk Creek Coal Co.	KENT 86-149-D
09-18-87	Local 1810, UMWA v. NACCO Mining Company	LAKE 87-19-C
09-18-87	Consolidation Coal Company	WEVA 87-66
09-21-87	Freeman United Coal Mining Co.	LAKE 86-67
09-22-87	Utah Power and Light Company	WEST 87-101
09-23-87	Sec. Labor for James C. Gray, Jr. v. Chaney Creek Coal Corp. etc.	KENT 86-55-D
09-25-87	Timber Lakes Corporation	WEST 86-250-M
09-25-87	Sec. Labor for Bryant M. Hatfield, Jr. v. Smith Brothers Construction, Inc.	WEVA 87-156-D
09-28-87	Westmoreland Coal Company	HOPE 78-236
09-29-87	Richard W. Peters, Sr. v. Buckeye Industrial Mining Co., Inc.	LAKE 87-37-D
09-29-87	Jim Walter Resources, Inc.	SE 87-91
09-29-87	Jim Walter Resources, Inc.	SE 87-95

*It was discovered that the decision, Garry Goff v. Youghiogheny and Oh
LAKE 84-86-D was not published in its entirety in the December, 1986 v
We are reprinting it at this time, but cites should refer to the Decem
publication.

estern Fuels-Utah v. Secretary of Labor, MSHA, Docket No. WEST 86-113-
tc. (Judge Maurer, August 4, 1987)

arley Smith v. Bow Valley Coal Resources, Inc., Docket Nos. KENT 86-23
ENT 86-84-D. (Judge Weisberger, August 19, 1987)

ecretary of Labor on behalf of Bryan Pack v. Maynard Branch Dredging
ompany and Roger Kirk, Docket No. KENT 86-9-D. (Judge Fauver, August

ecretary of Labor on behalf of Joseph Gabossi v. Western Fuels-Utah, I
ocket No. WEST 86-24-D. (Judge Morris, August 21, 1987)

o cases were filed in which review was denied.

COMMISSION DECISIONS

v.	:	Docket No. LAKE 85-87-R
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	
and	:	
	:	
UNITED MINE WORKERS OF AMERICA (UMWA)	:	
	:	
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. LAKE 86-2
	:	
NACCO MINING COMPANY	:	
	:	
and	:	
	:	
UNITED MINE WORKERS OF AMERICA (UMWA)	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY: Backley, Doyle and Nelson, Commissioners

This proceeding arises under the Federal Mine Safety and He Act of 1977, 30 U.S.C. § 801 et seq. (1982), and involves the iss of a citation pursuant to section 104(d)(1) of the Mine Act by an inspector of the Department of Labor's Mine Safety and Health Adm stration ("MSHA") as a result of an inspection conducted pursuant section 103(g)(1) of the Act. 1/ Commission Chief Administrative

---

1/ Section 104(d)(1) states:

If, upon any inspection of a coal or other mine,

that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this [Act]. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(d)(1).

Section 103(g)(1) states in part:

> Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this [Act] or a mandatory health or safety standard exists ... such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger.... Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this [Title]. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

30 U.S.C. § 813(g)(1).

presented in this case. Therefore, we reverse and remand.

Nacco's Powhatan No. 6 mine is an underground coal mine lo eastern Ohio. On Friday, May 31, 1985, the miners' representati the mine requested, by telephone and confirmatory letter, that M conduct an examination of "long cuts" being made at the mine. 2/ request referenced a specific long cut alleged to have occurred previous day. The letter stated that "[t]his re-occurring [sic] violation has been discussed with mine management several times January 1985 by the UMWA and MSHA without getting this practice stopped." The letter further suggested that criminal action mig appropriate.

MSHA inspectors arrived at the mine on the following Monda 3, 1985. The inspectors went underground to the location where cut allegedly had occurred. Through observations and measuremen inspectors determined to their satisfaction that a long cut had made on May 30, and that in making the cut the continuous miner was under unsupported roof, at least six feet beyond the last pe roof supports. On June 4, 1985, the inspectors returned to the further questioned the crew, union representatives, and mine man about the long cut. On June 5, 1985, the inspectors issued to N citation pursuant to section 104(a) of the Mine Act, 30 U.S.C. § charging that the continuous miner operator's proceeding under u supported roof constituted a violation of 30 C.F.R. § 75.200. 3/ citation indicated that the violation was of a "significant and substantial" nature.

On June 24, 1985, the MSHA sub-district manager reviewed t citation. He concluded that the citation should have been issue *pursuant to section 104(d)(1) of the Mine Act because, in his op* the violation was the result of Nacco's unwarrantable failure to miners from proceeding under unsupported roof. He ordered the c modified accordingly. At the subsequent evidentiary hearing, Na not contest the allegation of a violation or that the viola ion

---

2/ A "long cut" occurs when a continuous mining machine ("con miner") cuts coal from the coal face in such depth that the cont miner operator is placed beyond the last permanent roof support under unsupported roof.

3/ In relevant part, section 75.200 prohibits persons from pr beyond the last permanent roof support, unless adequate temporar support is provided or unless such temporary support is not requ under the approved roof control plan and the absence of such sup will not pose a hazard to the miners.

upon the unreviewed decisions of three Commission administrative law judges: Westmoreland Coal Co., Nos. WEVA 82-304-R, etc. (May 4, 1983)(ALJ Steffey)(unpublished order); Emery Mining Corp., 7 FMSHRC 1908 (November 1985)(ALJ Lasher); Southwestern Portland Cement Co., 7 FMSHRC 2283)(December 1985)(ALJ Morris). 4/ The judge quoted with approval Judge Steffey's observations in Westmoreland, supra, that section 104(d) restricts the issuance of unwarrantable failure sanctions to existing violations found during the course of an inspection and that Congress intended to distinguish between the terms "inspection" and "investigation" in the Mine Act. 8 FMSHRC at 61-66. The judge also noted Judge Lasher's statement in Emery, supra, that Congress viewed an investigation of a past occurrence as different from an inspection of a mine site, and that the Act does not permit a section 104(d) sanction to be issued based upon past occurrences. Judge Merlin noted that Judges Steffey, Lasher, and Morris agreed that when an inspector is engaged in the investigation of a past happening rather than an inspection of an existing situation, section 104(d) sanctions cannot be issued. 8 FMSHRC at 71.

The judge found the reasoning of his colleagues persuasive and applied it to the facts at hand. The judge stated that when the inspectors went to the mine on June 3 and 4, 1985, they were looking into the circumstances of an event alleged to have occurred in the past -- the continuous miner operator having proceeded beyond the last permanent roof support on May 30, 1985. Because the inspectors were investigating a past happening rather than inspecting an existing condition, the judge held that they could not issue a citation under section 104(d). 8 FMSHRC at 71-72. Accordingly, the judge modified the citation to one issued under section 104(a).

Turning to the penalty aspect of the case, the judge concluded that the violation was serious and that Nacco was grossly negligent in allowing the violation to exist. He assessed a civil penalty of $5,000. 8 FMSHRC at 73-75.

The United Mine Workers of America sought Commission review on the grounds that the judge erroneously interpreted the prerequisites for the issuance of a citation under section 104(d). We granted the UMWA's petition for discretionary review and heard oral argument in this and

---

4/ Commission Administrative Law Judge William Fauver subsequently reached an opposite conclusion in Florence Mining Co., 9 FMSHRC 1180 (June 1987)(ALJ), review directed, August 7, 1987. See also Rushton Mining Co., 9 FMSHRC 800 (April 1987)(ALJ Broderick)(distinguishing above decisions).

The specific issue before us requires a determination of wh section 104(d) citation may be issued for a violative condition t longer exists when cited by the MSHA inspector. Such a determina must take into account the overall enforcement scheme of the Mine and its primary purpose of providing miners with more effective protection from hazardous conditions and practices. 30 U.S.C. § See also Senate Subcommittee on Labor, Committee on Human Resourc 95th Cong., 2d Sess., Legislative History of the Federal Mine Saf Health Act of 1977, at 82-86 (1978)(statement of Senator Williams Act Legis. Hist."). In line with this purpose, section 2(e) of t places primary responsibility upon "the operators of such mines w assistance of the miners ... to prevent the existence of such [ha dous] conditions and practices in such mines." 30 U.S.C. § 801(e

As an incentive for operator compliance, the Act's enforcem scheme provides for "increasingly severe sanctions for increasing serious violations or operator behavior." Cement Division, Natio Gypsum Company, 3 FMSHRC 822, 828 (April 1981). Sections 104(a) 110(a) provide that the violation of any mandatory standard requi issuance of a citation and assessment of a monetary civil penalty Under sections 104(b) and 110(b), if the operator does not correc violation within the prescribed period, the more severe sanction withdrawal order is required, and a greater civil penalty is asse 30 U.S.C. §§ 814(b) and 820(b). Under section 104(d), if an insp finds a violation and also finds that the violation is of a signi and substantial nature and has resulted from the operator's unwar table failure to comply with the standard, a citation noting thos findings is issued. This "section 104(d) citation" carries enfor consequences potentially more severe than section 104(b) sanction If further unwarrantable failure violations occur within 90 days citation issued under section 104(d), unwarrantable failure withd orders are triggered. Issuance of the withdrawal orders does not until an inspection of the mine discloses no unwarrantable failur violation. Kitt Energy Corp., 6 FMSHRC 1596 (July 1984), aff'd s UMWA v. FMSHRC, 768 F.2d 1477 (D.C. Cir. 1985).

5/ Emerald Mines Corporation, 9 FMSHRC ___ (September 30, 1987 White County Coal Corp., 9 FMSHRC ___ (September 30, 1987); Green Collieries, 9 FMSHRC ___ (September 30, 1987).

6/ The Secretary argues that only section 104(a) authorizes th issuance of a citation and that it is, therefore, improper to ref citation issued with section 104(d) findings, as here, as a "sect 104(d) citation." For convenience and clarity, we have found it to refer to a citation issued with section 104(d) findings as a s 104(d) citation. Consolidation Coal Co., 6 FMSHRC 189, 191-192 (February 1984). This shorthand form of expression is commonly e

of the operator that triggers section 104(d) sanctions, not the coincidental timing of an inspection with the occurrence of a violation. Indeed, Congress viewed section 104(d) as a key element in the overall attempt to improve health and safety practices in the mining industry. See S. Rep. No. 181, 95th Cong., 2d Sess. 30-32 ("S. Rep.") reprinted in Mine Act Legis. Hist. 618-620. See also UMWA v. FMSHRC, supra, 768 F.2d at 1479. To read out of the Act the protections and incentives of section 104(d) because an inspector is not physically present to observe a violation while it is occurring distorts the focus and blunts the effectiveness of section 104(d). We discern no warrant for such a formalistic approach.

The judge's invalidation of the use of section 104(d) for a prior violation and his conclusion that section 104(d) may be used for existing violations only, is not supported by the relevant statutory language. Section 104(d)(1) does not state that enforcement action may be taken only if the inspector finds a violation in progress. Rather, section 104(d)(1) is triggered if an inspector finds that there "has been a violation" of a mandatory health or safety standard. Use of the present perfect tense of the verb "to be" in this key context denotes a wide, not narrow, temporal range covering both past and present violations. Thus, by its own terms, section 104(d)(1) sanctions are applicable to prior as well as existing violations, and nothing in the text of section 104(d)(1) restricts their use solely to ongoing violations.

Nor can the insistence on the inspector's personal observation of an existing violation be reconciled with the obvious purpose of section 104(d). Throughout section 104(d), enforcement action is consistently linked to the inspector's determination that a violation has resulted from the operator's unwarrantable failure to comply with a mandatory standard. The focus in section 104(d) is constantly upon the operator's conduct in failing to comply with the cited mandatory standard, not upon the current detection and existence of the violation. Under the construction urged by Nacco, unwarrantable failure findings would frequently be unavailable despite unwarrantable conduct on the part of an operator.

We have resisted previous invitations to give the Mine Act a technical interpretation at odds with its obvious purpose. In Westmoreland Coal Co., 8 FMSHRC 1317, 1323-27 (September 1986), a case involving the right of miners to compensation under section 111 of the Mine Act, 30 U.S.C. § 821, we concluded that the chronological sequence in which orders of withdrawal are issued is not determinative of the right to compensation. We looked to the purpose of section 111 -- adde incentive for operator compliance through a graduated scheme of compensation tying enlarged compensatory entitlement to increasingly serious operator conduct. We noted the focus of section 111 as a whole on operator conduct, and we declined to adopt a technical interpretatio

a manner consistent with its purpose. Congress deemed that miners should be protected from the hazards of recurring violations caused by an operator's unwarrantable failure through the deterrent effect of th progressively severe sanctions of section 104(d). Legis. Hist. at 619 Yet, application of the judge's holding produces results at odds with this intent. Under the judge's opinion, an operator who commits an unwarrantable failure violation that is not detected by the inspector until it has ceased to exist is free of the very sanction intended to prevent similar failures in the future. The fact that such a violatio could be cited under section 104(a) and that a penalty would be assess for the violation, does not compensate for the loss of the heightened awareness of unwarrantable violations that attends section 104(d) sanctions and that is aimed at preventing such violations from occurri in the first instance.

Further, detection of a violation after it has ceased to exist i not uncommon. Many violations by their very nature cannot be, or are unlikely to be, observed or detected until after they occur. For example, the failure to perform a required pre-shift examination, 30 C.F.R. § 75.303, is usually detected after the shift has commenced, and most health violations are determined after the fact of violation through the analysis of samples and other data. See, e.g., 30 C.F.R. § 70.100. In fact, the violation at issue here, proceeding beyond the last permanent roof support when no temporary support is provided, is the type of violation that is unlikely to occur in the presence of the inspector. Were we to agree with the approach adopted by the judge, t statutory disincentive for operator misconduct would be lost. 7/

Nacco asserts that because section 104(d) refers only to violations found "upon any inspection," whereas section 104(a) refers violations found "upon inspection or investigation," Congress intended to distinguish between enforcement actions based upon an inspection an those based upon an investigation. Nacco argues that an "inspection" denotes the time in which an inspector is physically present at the mi (and actually observes a violation in progress), whereas an "investi- gation" denotes an inspector's inquiry into a past violation. There- fore, according to Nacco, section 104(d) applies only to ongoing violations observed by the inspector.

Although we are not required in this proceeding to decide the meaning of "inspection" and "investigation" for all purposes under the Mine Act, we are satisfied that, as used in section 104(d), Congress d not intend the distinction urged by Nacco and approved by the judge. interpreting the conditions under which a section 104(d) sanction may issue, we do not find significant the inclusion of the terms "inspecti or investigation" in section 104(a) and the term "inspection" alone ir section 104(d). The words are not defined in the Mine Act, and commor

---

7/ Although Nacco argues that untoward problems in terms of the "ti

national Dictionary (Unabridged) 1170, 1189 (1971) ("Webster's"). B
words can encompass an examination of present and past events and of
existing and expired conditions and circumstances. 8/

The first major reference to both terms appears in section 103
the Act, 30 U.S.C. § 813, which pertains to inspections, investigati
and record keeping. While it is true that section 103 indicates tha
inspection and investigation are, to some extent, distinct, it is al
clear that, as in common usage, the concepts are not intended to be
mutually exclusive. In particular, it is clear that an inspection i
not meant to preclude an inquiry into past events. Section 103(g) (
supra) provides to the representative of miners the right to obtain
immediate "inspection" whenever the representative has reasonable
grounds to believe that a violation of a mandatory health or safety
standard exists. There is nothing in the language of section 103(g)
that requires the violation to be ongoing when the inspector arrives
the mine site. As a practical matter, the violation may have been
corrected shortly after the request of the miners' representative an
before the inspector reaches the mine. Yet the inspector is nonethe
on an "inspection" and, if he finds that a violation has occurred, h
may cite it using the full panoply of sanctions available under the
Indeed, this case was instituted on the basis of a section 103(g)
inspection, requested by the representative of miners, after the
violation had occurred.

Further, we find in the legislative history of section 104(d)
indications that section 104(d) sanctions are not restricted to
occasions when an inspector observes an existing violation. Section
104(d) of the Mine Act was carried over without substantive change f
section 104(c) of the 1969 Coal Act. 30 U.S.C. § 801 et seq. (1976)

8/ See also, e.g., Atlantic Cleaners & Dyers, Inc. v. U.S., 286 U
427 (1932):

> Most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section.
>
> * * * * *
>
> It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it to have in each instance.

Labor and Public Welfare, 94th Cong., 1st Sess. Part I Legisla
History of the Federal Coal Mine Health and Safety Act of 1969
918 (1975)("Coal Act Legis. Hist."). Judge Steffey in Westmor
supra, quoted by Judge Merlin with approval (8 FMSHRC at 63),
this definition as support for a conclusion that Congress inte
distinguish between an "inspection" and an "investigation" bec
regarded an inspection as an examination limited to a single d
However, the House Bill definition of inspection was dropped a
conference in favor of the Senate version of section 104(c)(1)
provided for findings of unwarrantable failure at any time dur
same inspection or during any subsequent inspection within 90
the issuance of the initial 104(c)(1) notice of violation "wit
regard to when the particular inspection begins or ends." Coa
Legis. Hist. at 1507. The Senate version was enacted as secti
104(c)(1) of the Coal Act, and reflects a clear congressional
standing that an inspection may take longer than one day (part
at large mines), that an inspector's inquiry into unwarrantabl
may take more time than any one-day period that he is in a min
that a finding of unwarrantable failure may require examinatio
events and actions "without regard to when the particular insp
begins or ends." Coal Act Legis. Hist. at 1507.

Nacco makes much of the fact that although Congress did
substantively change the language of section 104(c) of the Coa
it was carried over as section 104(d) of the Mine Act, Congres
change section 104(a) of the Mine Act by authorizing the Secre
issue citations upon an inspector's "belief" that an operator
the Act and upon either an "inspection or an investigation."
the inspector's belief can be premised upon a retrospective in
past events and circumstances, or upon an analysis of present
circumstances. Nacco finds the change in section 104(a) compe
evidence that Congress distinguished between enforcement actio
can be based upon past or present conditions and those that mu
based solely upon present conditions.

We are not persuaded. The fact remains that there is no
indication in the Mine Act legislative history that Congress i
the change in section 104(a) to affect the application of sect
104(d)'s unwarrantable failure sanctions in any way. In fact,
been asserted, by way of explanation, that the change in secti
merely reflects the drafters' technical reliance on the langua
Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et
(1970), in amending the Coal Act rather than an intent to chan
circumstances under which a section 104(d) citation can be iss
Biddle, Coal Law & Regulations § 9.03[2][b] (1968). We are re
draw substantive inferences from the change where evidence of
legislative intent is lacking.

has occurred based upon whatever process of discovery or examination ma be appropriate.

In sum, the result reached by the judge frustrates the deterrent power of section 104(d). After searching the language and purpose of the Act, as well as the legislative histories, we find no evidence that Congress intended to place such a severe limitation on so important an enforcement mechanism. 9/ Consequently, and for the foregoing reasons, we conclude that a section 104(d) sanction may be based upon a prior violation and that the judge erred in holding that the citation was improperly issued under section 104(d) of the Mine Act. We reverse the judge in this regard.

At the hearing Nacco challenged the validity of the section 104(d)(1) citation on the grounds that the sub-district manager ordered the modification as a matter of policy, and that all such roof control violations were automatically deemed to be unwarrantable without regard to the particular facts involved. The judge made mention of the sub-district manager's decision to modify the citation and appears to have inferred that the modification improperly rested upon general policies without consideration of the particular circumstances of the violation. 8 FMSHRC 72-73. However, the judge made no conclusions on this issue given his disposition of the case. Since questions may remain regardin the sub-district manager's decision to have the citation modified from section 104(a) citation to section 104(d)(1) citation, the judge should as part of his disposition, clarify his finding as to whether the modification was proper within the statutory framework. If he determines that the sub-district manager's modification was proper, he shall then determine whether the violation resulted from an unwarrantable failure to comply with the standard.

9/ Moreover, this case involves a factual situation that begins with an exercise of miners' rights under section 103(g)(1). As noted, that section provides that the miners' representative may obtain an "immediate inspection" of the mine by MSHA whenever the representative "has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists...." 30 U.S.C. § 813(g)(1). Congress intended that through the exercise of this "important right" miners are to "play an integral part in the enforcement of the mine safety and health standards." Mine Act Legis. Hist. at 617-618. Yet, as the facts of this case illustrate, were we to hold that an operator must be caught in the act of violation before the appropriate section 104(d) enforcement actions could be taken, the miners' self-help remedy embodied in section 103(g)(1) could be eroded seriously.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

of the rationale comporting with Commission precedent . . . some of the arguments of the operator and the dissent need to be addressed more directly.

The question of law before us can be stated in general terms as follows: Can a finding by MSHA, that a violation of the Mine Act was caused by an "unwarrantable failure" on the part of a mine operator, be included in a citation issued for a violative condition that occurred but is no longer in existence so as to be observable at the time of an MSHA inspection? The more specific question posed is whether the administrative law judge erred in concluding that in the circumstances of the present case it was procedurally improper for MSHA to find that the violation resulted from Nacco's unwarrantable failure. As explained below, both of these questions must be answered in the affirmative.

The relevant facts are undisputed. A miners' representative reported to MSHA a violation alleged to have occurred at Nacco's mine. The reported violation involved an operator of a continuous mining machine extracting coal to an excessive depth such that he impermissibly placed himself under an unsupported portion of the mine's roof. The report to MSHA further stated that this type of violation was recurring at the mine despite past discussions with mine management by both MSHA and the United Mine Workers of America. The miners' representative requested "an immediate investigation" by MSHA of the incident and suggested that criminal prosecution under the Mine Act might be warranted. (Exh. GX-4).

Pursuant to this request, two MSHA inspectors went to Nacco's mine. They reviewed the mine's daily report books and saw no reference to the incident. They proceeded underground. They observed the location of the reported incident and took measurements of the width and depth of the mined area and the spacing of the roof support bolts that had been installed. The following day the inspectors questioned miners, management personnel and representatives of the miners concerning the incident. The inspectors determined that, as had been reported to MSHA, the operato of the continuous mining machine had proceeded under unsupported roof in violation of 30 C.F.R. § 75.200. They issued a citation alleging a violation and indicated on the citation that it was issued pursuant to section 104(a) of the Mine Act. They also indicated on the citation that they found the violation to be a "significant and substantial" violation.

Fifteen days after the citation was issued, it was modified at the direction of the inspectors' supervisor to include a further finding that the violation resulted from Nacco's "unwarrantable failure to comply" with the applicable mandatory standard. 30 U.S.C. § 814(d)(1).

Nacco's concern over the making of the unwarrantable failure finding has its roots in the more severe enforcement consequences triggered by the presence of such a finding in a citation. For presen purposes, those consequences can be succinctly highlighted by quoting summary of the statutory provision by the U.S. Court of Appeals for th District of Columbia Circuit:

> An "unwarrantable failure" citation commences a probationary period: If a second violation resulting from an "unwarrantable failure" is found within 90 days, the Secretary must issue a "withdrawal order" requiring the mine operator to remove all persons from the area ... until the violation has been abated. Such withdrawal orders are among the Secretary's most powerful instruments for enforcing mine safety.
>
> Once a withdrawal order has been issued, any subsequent unwarrantable failure results in another such order. This "chain" of withdrawal order liability remains in effect until broken by an intervening "clean" inspection. That is, "an inspection of such mine [which] discloses no similar violations." 30 U.S.C. § 814(d)(2).

UMWA v. FMSHRC and Kitt Energy Corp., 768 F.2d 1477, 1479 (D.C. Cir. 1984)(emphasis added).

There is no dispute in the present case that the enforcement effe of an unwarrantable failure finding made pursuant to section 104(d) is as described above. What is disputed, however, is the extent of the availability of this statutory mechanism to certain violative situations, viz., whether an unwarrantable failure finding can be made in conjunction with a citation issued for a violative condition that occurred but is no longer in existence so as to be observable by an MSHA inspector.

The answer to this question must first be sought in the language section 104(d)(1). Quotation of the first sentence of the section and identification of its discrete components serves to focus the inquiry:

> [1] If, upon any inspection of a coal or other mine, an authorized representative of the Secretary [2] finds that there has been a violation of any mandatory health or safety standard, and [3] if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety

in any citation given to the operator under this Act.

30 U.S.C. § 814(d)(1). (Bracketed numbers added).

The arguments in support of the procedural validity of the Secretary's action in issuing the citation in this case, reduced to their essence, are straightforward: Each element of section 104(d)(1) being met, the citation properly was issued pursuant to section 104(d)(1). In my opinion, based on the undisputed facts, the procedural history recited above, and the plain text of section 104(d)(1), there is no apparent procedural error associated with the Secretary's action in issuing the contested citation pursuant to section 104(d)(1). There was: (1) an inspection; (2) a finding of a violation; (3) a significant and substantial finding; (4) an unwarrantable failure finding; and (5) all of the above findings were included in a citation issued to the operator. The opposite conclusion is advanced by the operator and the dissent with such vigor, however, that a closer examination of their contentions should be undertaken to determine whether there is a less apparent, but nevertheless fatal flaw in the Secretary's actions.

Clause [1] of the first sentence of section 104(d)(1) provides that the actions identified in clauses [2] through [5] be taken "upon any inspection of a coal ... mine". (Emphasis added). Much is made by the operator and the dissent of the fact that the word "inspection" and the word "investigation" are both used in the Mine Act in referring to and describing the various enforcement activities of the Secretary authorized by the Act. In some instances both words appear in the same provision (e.g., § 104(a), § 107(a)), but in other provisions only one of the words appears (e.g., § 103(b)(investigation), § 104(d)(inspection), § 104(e)(inspection) and § 105(c)(2)(investigation)).

The basic point of the arguments highlighting the Mine Act's varying usage of the words "inspection" and "investigation" is that the words are different, their meanings are different and a distinctive impact on the Secretary's enforcement activities and the consequences flowing therefrom was intended depending on the particular word used in a particular statutory provision. As specifically related to the principal issue presented in this case, the argument advanced is that because clause [1] of section 104(d)(1) refers only to "inspections", the special findings provided for in clause [3] ("significant and substantial") and clause [4] ("unwarrantable failure") cannot appropriately be included in citations issued as a result of "investigations" by the Secretary.

Despite the force with which this argument is advanced, extensive consideration of its merits is unnecessary and inappropriate in the present case. The fact is that the citation at issue was issued "upon an inspection" of the mine. It is undisputed that the inspectors were at Nacco's mine pursuant to a request by a representative of the miners that MSHA look into the circumstances surrounding a reported violation

> representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. ....Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists....

30 U.S.C. § 813(g)(1)(emphasis added). 1/ Therefore, because the citat disputed in this case was issued "upon an inspection" conducted pursuan to section 103(g)(1), it is unnecessary here to address the contention that citations cannot be issued pursuant to section 104(d) where throug the course of an MSHA "investigation" it is determined that violations have occurred even though they are no longer in existence. That questi appropriately is addressed in a case that actually poses the issue.

The next basis for the argument that the provisions of section 104(d)(1) were not intended to be applied to violations that occurred but are no longer in existence at the time of an MSHA inspection center on that section's use of the word "finds" as the predicate for actions taken thereunder. (Clause [2] If an inspector "finds that there has been a violation"; clause [3] "if he also finds that" the violation is significant and substantial; and clause [4] "if he finds such violation to be caused by an unwarrantable failure")(emphasis added)). Nacco argues that the plain meaning of "find" is "to happen on; come upon; meet with; discover by chance". Nacco's brief at 12, citing Webster's New World Dictionary 523 (2d Coll. ed. 1976). It asserts that a violative condition that no longer exists cannot be happened upon or discovered by chance and therefore cannot be "found" during an inspection within the meaning of section 104(d)(1). The Secretary and the UMWA argue in opposition that in section 104(d)(1) the word "finds" is used in its adjudicative sense to describe the reaching of a conclusion by an inspector.

In my opinion, the operator's argument that the use of the word "finds" in section 104(d)(1) requires the inspector to discover a presently existing violative condition is defeated by a plain reading of the section. Clause [2] states: if an inspector "finds that there has been a violaton...." The use of the phrase "finds that" clearly refers to a conclusive finding rather than a finding in the nature of a chance

1/ Although a suggestion that section 103(g)(1) itself was intended b Congress to be applicable only to presently existing violations has bee proffered, it has been advanced with little vigor in a footnote to the operator's brief. See Nacco's brief at 15 n. 17. In fact, even this limited espousal of a narrow reading of the text of section 103(g)(1) was disavowed at oral argument before the Commission. See Oral Arg. Tr. at 52-53.

there is a presently existing violation" is to give a tortured rather
plain reading to clause [2]. The text of clauses [3] and [4] also is
contrary to the argument advanced by Nacco. In describing further act
be taken by the inspector, clauses [3] and [4] respectively provide th
he also finds that ... such violation" is significant and substantial
he finds such violation to be caused by an unwarrantable failure...."
both of these uses of the word "finds" plainly are in the sense of con
findings; the inspector must make determinations as to whether the lev
danger posed by a violation and the nature of the operator's conduct a
with the violation meet the thresholds of governing legal tests. Thes
of determinations are not "chance discoveries" or conditions "happenc
Rather, they are determinative findings or conclusions arrived at thro
faculty of mental reasoning. That this is the plain meaning of the wo
as used in section 104(d)(1) is further underscored by clause [5]'s pr
that the inspector "shall include such finding[s] in any citation give
operator under this Act." (Emphasis added). 2/

Furthermore, clause [5] 's provision that such findings shall be
"in any citation" issued to the operator (emphasis added), by its pla
authorizes, rather than prohibits, the making of unwarrantable failure
in any citation, including a citation issued for a violation that occu
of the sight of an MSHA inspector.

Therefore, I conclude that a plain reading of section 104(d)(1)
a conclusion that the Secretary properly can issue a citation thereun
taining findings that a violation occurred but no longer exists, that
violation is a significant and substantial violation and that the vio
resulted from an unwarrantable failure by the operator to comply with
tory standard. 3/

2/ Nacco's reliance on Holland v. United States, 464 F. Supp. 117 (
Ky. 1978), to support its interpretation of section 104(d) is unperau
The Holland court's discussion of section 104(d) arose in the context
tort claim based on negligent inspection, a context clearly distingui
from the enforcement case before us. Even assuming its applicability
further assuming that Holland supports the proposition that a violati
be observed by an inspector to be cited under section 104(d), I would
fully disagree.

3/ The parties cite, and the majority and dissenting opinions discu
some detail, the legislative history pertaining to the origins of sec
104(d). Even when the meaning of statutory text appears clear on its
it is not inappropriate to examine legislative history for any furthe
enlightenment as may be available concerning congressional intent. T
Colorado Public Interest Research Group, 420 U.S. 1, 9 (1975). See 2
land Statutory Construction, § 48.01, p. 278 (4th ed. 1984). Accordi
have reviewed the proffered passages and the arguments based thereon.
in the legislative history absolutely no indication that Congress spe
focused upon or had any reason to be aware of the nuance to the enfor

he dissent argue that such action is nonetheless improper because it ins directly counter to the fundamental purpose and logic underlying ection 104(d). The operator repeatedly describes section 104(d) as a time critical" provision and argues that once a violative condition has eased to exist the appropriate time for proceeding under section 104(d) lso has ceased. Nacco submits that the purpose of section 104(d) "is o encourage compliance, not to punish an operator" and that to allow itations under section 104(d) of violations that are no longer in xistence at the time of an MSHA inspector's arrival at the mine leads o the "Kafkaesque" and "bizarre" result that a withdrawal order would e issued for a hazardous condition that is no longer present. Nacco's rief at 20-21. The dissent echoes these themes in asserting that "the ecretary ... is motivated more by retribution than by the protection of iners when he issues a section 104(d) citation or withdrawal order for hazard that no longer exists" and that in such circumstances "bald arassment becomes inevitable." Dissent at 32, 36.

Contrary to these characterizations of the cataclysmic effect of our pholding the Secretary's right to proceed as he did in this case, the esult we reach not only is consistent with the plain langugage of sectio 04(d) as discussed above, but also is entirely consistent with the nforcement logic underlying the section as discussed below. Furthermore n light of the operator's and the dissent's predictions of the dire con- equences that will result from our upholding the Secretary's actions, it s important to underscore the fact that our decision is simply an affir- ation of the Secretary's right to continue to enforce this provision as as always been enforced under both the 1977 Mine Act and its predecessor tatute, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § t seq. (1976)(amended 1977)

The feature that distinguishes section 104(d) from other enforcement rovisions in the Mine Act is its authorization of the Secretary to find violation to have been caused by an unwarrantable failure of the opera- or to comply with a standard. No other provision in the Mine Act concer tself with whether the conduct of an operator in conjunction with a viol ion was "unwarrantable." The importance of an unwarrantable failure inding in a citation stems from the probationary effect triggered by its resence as was described at the outset of this opinion (supra at 2) by uoting the court of appeals decision in Kitt Energy Corp. As described herein, once a citation containing an unwarrantable failure finding and significant and substantial finding has been issued, any further viola- ion also caused by an unwarrantable failure within 90 days requires ssuance of a withdrawal order, as do still further violations until a omplete, clean inspection of the mine has taken place.

n. 3/ continued

ind none of the referenced passages so illuminating on the question at i s to justify any interpretation in conflict with a plain reading of sect

where a violation results from an operator's unwarrantable failure, the statute requires that a higher toll be exacted from the operator than is exacted in situations where, although a violation occurred, the operator has not acted unwarrantably. In arguing that the special provisions of section 104(d) are not logically applied to violations that occurred but no longer exist, the operator and the dissent ignore the section's focus on the conduct of the operator, which would be the same regardless of whether an inspector observed the violation. They further overlook the fact that the Secretary's inquiry into whether an operator's conduct in relation to a violation was unwarrantable, will be precisely the same type of inquiry undertaken in precisely the same manne regardless of whether the violation actually was observed by an inspector Simply put, determination of whether an operator's conduct in relation to a violation was unwarrantable is not at all contingent on or affected by whether a violative condition remains in existence at the time of inspect

Concomitant with their failure to recognize that the operator's conduct, rather than the timing of the inspector's arrival, is the focal point of section 104(d), the operator and the dissent erroneously assert that proceeding under section 104(d) where a violative condition is not presently in existence serves no safety purpose and constitutes meaningless punishment. If this is true a remarkable transformation has been worked. The use of one of "the Secretary's most powerful instruments for enforcing mine safety" (Kitt Energy, supra, 768 F.2d at 1479) has been reduced to nothing more than purposeless punishment unrelated to the safety goals of the Mine Act.

The essence of the argument that no safety purpose is served by proceeding under section 104(d) for violations not discovered during their existence can be cast in terms of the following syllogism: (1) Hazardous conditions threaten miners' safety; (2) no hazardous condition exists if a violative condition is not presently in existence; (3) therefore miners' safety is not threatened in these circumstances. The fallacy in this syllogism lies in its second premise. Contrary to the arguments of Nacco and the dissent, a very significant safety concern is presented in situations where an inspector determines that a violation occurred even though the violative condition no longer exists. Furthermore, such situations, like those where violative conditions are observed by an inspector, appropriately can be addressed pursuant to the procedures set forth in section 104(d) with no damage to that section's underlying enforcement logic

To be sure, the most clear cut example of a hazard jeopardizing miner safety is an observable physical condition that is in violation of an applicable mandatory standard. Where such a violative condition is observed by an inspector and is determined to have resulted from unwarrantable conduct by the operator, the section 104(d) probationary scheme indisputedly is appropriately invoked. A significant threat to miner's safety also is presented, however, by situations such as that in the present case where a violative condition has occurred but has ceased to exist prior to the inspector's arrival at the level of danger posed in such

to the miner will end. Where an inspector is not present to interven however, the violative act and the associated hazard will likely cont to exist until the work task being performed in a violative manner is completed. Second, where a violation has not been observed by an insp tor the violative conduct is more likely to be repeated in the future to the lack of any immediate intervening sanction directed at the vio act dissuading its repetition. This latter consideration is forceful illustrated in the present case by the recurring instances of miners working under unsupported roof at Nacco's mine that prompted the mine representative's complaint to MSHA and request for intervention. The despite Nacco's and the dissent's suggestions to the contrary, the ha or threat to miner safety posed by violations that are not observed by MSHA inspectors often will exceed, in duration as well as instances o exposure, the hazard posed by violations that happen to be caught by inspectors during the period of their existence.

Since violations that occurred but were not observed by MSHA inspectors during the period of their existence pose at least as grea if not greater, danger to miner safety as violations that are observe the necessity and logic of applying the enforcement procedures in sec 104(d) to unobserved as well as observed violations is evident. In b instances MSHA inspectors will have determined that violations of man tory standards occurred. In both instances citations specifying the nature of the violations and addressing abatement measures will be issued. 4/ In both instances the inspectors will determine whether the violation resulted from the operator's unwarrantable conduct and, if so, the operator will be put on notice that further unwarrantable violations will result in the cessation of mining operations through the issuance of withdrawal orders. In short, in both instances the important sanctions Congress provided in section 104(d) can be logically invoked and effectively directed at the precise type of aggravated operator conduct to which section 104(d) was intended to be applied.

For the foregoing reasons, as to the question of law before us, agree with the majority's conclusion that the Secretary is not barred from issuing a citation pursuant to section 104(d)(1) of the Mine Act for a violation that occurred but is no longer in existence so as to observable during an MSHA inspection.

4/ Abatement of an observed instance of a miner working under unsup ported roof normally would involve removal of the miner from the unsa area and instruction of the miner, and others if appropriate, concern the need for future compliance with roof control standards. Abatemen of a similar, but unobserved, violation necessarily would emphasize t latter.

arbitrarily, capriciously [illegible] in the abstract, it may be possible that the Secretary's [illegible] 104(d) sanctions for a violation that occurred far in the past could on the particular factual context, constitute impermissible enforce See generally dissent at 22, 33-36. This vague specter of possible however, is a plainly insufficient basis for foreclosing in all cir the Secretary's ability to cite past violations under section 104(d relevant is how the Secretary actually proceeds in non-theoretical situations.

In the case before us, the Secretary conducted an inspection to a miners' representative's report of a violation. The violation on a Thursday, the request for an inspection was made on a Friday, retary's inspection took place on the following Monday and Tuesday section 104(a) citation was issued on Wednesday. The finding that lation resulted from the operator's unwarrantable failure, resulti modification of the citation to a section 104(d)(1) citation, was 19 days later. As of this date the operator was put on notice tha subject to a section 104(d) probationary chain and that to avoid t of withdrawal orders avoidance of further unwarrantable violations next 90 days was necessary. Thus, section 104(d) was invoked and in a manner consistent with its intent.

Based on these circumstances, and the record in this case, I basis for any conclusion that an injustice to the operator or a pe section 104(d)'s enforcement scheme has been caused by the Secret

Accordingly, I join the majority in reversing the judge's de remanding for further proceedings. 5/

James A. Lastowka
Commissioner

5/ I agree with the majority that further findings concerning violation at issue resulted from the operator's unwarrantable fa necessary. Although the judge indicated that he desired to avoi a remand in the event he was reversed on the controlling questio (8 FMSHRC at 73), the intended meaning of his findings as to the of the modification of the citation and whether the operator's c fact, was unwarrantable, is not totally clear. See 8 FMSHRC at also, Oral Arg. Tr. at 38-39. Clarification of these points thr findings is necessary. Regarding the procedural propriety of th of the citation, two points should be noted. First, an inspecto certainly has the power to review the inspector's enforcement ac based on that review, direct appropriate modifications of the in action. Second, the record in this case contains evidence, not the judge, concerning the sub-district manager's consideration

majority would reverse, holds that an MSHA inspector is not authori
to issue an unwarrantable failure citation or order of withdrawal f
a pre-existing violation that no longer exists at the time of his o
site inspection. According to the judge's reasoning, the sole post
sanction available to the inspector in such circumstances is a cita
authorized under section 104(a) of the Federal Mine Safety and Heal
Act of 1977, 30 U.S.C. § 801, 814(a). 1/ All Commission judges who
sidered this issue prior to this appeal had agreed with Judge Merli

On appeal, the Secretary and the United Mine Workers of Americ
(UMWA) argue -- and the majority agrees -- that the scope of sectio
30 U.S.C. § 814(d), is so broad as to authorize unwarrantable failu
tions (including mine closure orders) for violations that, while th
have existed in the past, no longer exist and therefore are not per
observed by the inspector. The section 104(d) sanctions imposed in
circumstances have no prophylactic purpose. Thus, the majority is
strained to justify the imposition of section 104(d) for a past com
violation because of its "deterrent effect" (Majority Slip Opinion
That expansive view conflicts with the plain meaning of the 1977 Ac
intentions of its authors, and its underlying policies. Accordingl
must respectfully but vigorously dissent.

*/ This opinion constitutes my general position on the applicabil
of unwarrantable failure sanctions to past completed violations not
observed by MSHA inspectors. My legal conclusions herein therefore
apply to three related cases also decided today: Greenwich Collier
Docket Nos. PENN 86-33 and PENN 85-188-R et al., 9 FMSHRC ____ (Se
1987); White County Coal Corp., Docket Nos. LAKE 86-58-R and LAKE 8
9 FMSHRC ____ (Sept. 30, 1987); and Emerald Mines, Docket No. PENN
9 FMSHRC ____ (Sept. 30, 1987).

1/ For purposes of this opinion, sanctions based on unwarrantable
allegations will be referred to as section 104(d) citations and ord
sanctions not alleging unwarrantable failure will be referred to as
104(a) citations. I agree with my colleagues' view that despite th
retary's theoretical arguments on this issue, such a distinction se
clarify the discussion.

2/ Greenwich Collieries, 8 FMSHRC 1105 (1986)(ALJ Maurer); White
Coal Corp., 8 FMSHRC 921 (1986)(ALJ Melick); Emerald Mines Corp., 8
324 (1986)(ALJ Melick); Southwestern Portland Cement Co., 7 FMSHRC
(ALJ Morris); Emery Mining Corp., 7 FMSHRC 1908 (1985)(ALJ Lasher);
Westmoreland Coal Corp., (WEVA 82-340-R et al.)(May 4, 1983)(ALJ St
As the majority notes, one judge has recently reached a contrary re
Florence Mining, 9 FMSHRC 1180 (1987)(ALJ Fauver). The Secretary c
indicates that this is a matter of first impression for the Commiss
Secretary's brief at p. 9. The Secretary cites only Rushton Mining
6 IBMA 329 (1976) both as precedent under the 1969 Coal Mine Health
Safety Act, 30 U.S.C. 801 et seq. (1970) and as an indication of tr

that may have occurred weeks or months before an inspector is made aware of it, let alone conducted his after the fact investigation as to whether and under what circumstances it may have existed. Additionally, the violation may no longer exist for any number of reasons: the area where it occcurred may long since have been abandoned; intervening incidents or conditions may have corrected or obliterated it; or a conscientious operator may have taken steps unilaterally to abate it. Unde any of these scenarios, no unwarrantable, significant and substantial violation exists that poses an ongoing hazard to miners or that demonstrates continuing operator indifference to miner health and safety. As will be demonstrated below, post hoc imposition of section 104(d) sanctions in such circumstances was simply not contemplated by Congress.

I. The Plain Meaning of Section 104

A. Present vs. Past Conditions

As stated in Higgins v. Marshall, one "must look first to the langu of the [Mine] Act itself and give [its] words ... their ordinary meaning 584 F.2d 1035, 1037 (D.C. Cir. 1978), cert denied 441 U.S. 931 (1979).

A parsing of the text of section 104(d) reveals the conscious inte of Congress to distinguish between citations based on present condition and those based on past conditions that are no longer extant when the inspector is physically present in the mine. This legislative purpose is directly reflected by the use of the present tense throughout sectio 104(d). 3/

Since the grammatical context of section 104(d) is the present ten it follows that its enforcement sanctions are directed toward extant violations. The statutory language itself does not encompass the expan sion of the section 104(d) sanction to include violations that no longe exist (or that have been abated) and, therefore, do not reflect current operator indifference to mine safety or a continuing risk to miners. 4/

3/ Under section 104(d)(1) a citation can only be issued where "the conditions created by such violation do not cause [not "did not" cause] imminent danger"; where "such violation is [not "was"] of such a nature as could [not "could have"] significantly and substantially contribute [not "contributed"] to the cause and effect of a ... hazard"; and only "if [the inspector] finds such violation to be caused [not "to have bee caused] by an unwarrantable failure of such operator to comply [not "to have complied"]. Similarly, a section 104(d)(1) withdrawal order can only be issued if the Secretary "finds another violation ... to be also caused [not "was caused"] by an unwarrantable failure." [Emphasis added

4/ Contrary to the argument of the majority the phrase "has been a violation" in section 104(d) does not lead to a contrary conclusion. "Has been" is the present perfect tense of "to be" denoting an action begun in the past and continuing into the present. Thus, "has been" is

sanction as applicable when an inspector finds that a mandatory heal safety standard "is being violated." 6/ The Senate's unwarrantable failure sanction was likewise applicable where the inspector "finds a standard] is being violated." 7/ The Conference Report restated t Senate characterization: "if an inspection of a coal mine shows that mandatory [standard] is being violated." 8/ Thus, when the 1969 Act passed Congress, the legislators agreed that unwarrantable failure sanctions applied to existing violations, that is, practices or cond tions that continue to violate mandatory health and safety standards up to the time the inspector witnesses them.

As noted above, the 95th Congress re-enacted the existing langu of the 1969 Act (section 104(c)) as section 104(d) of the 1977 Act. so doing Congress found the language to be "effective and viable" in existing form. 9/ Lastly, the Senate Labor Committee clearly spoke timeliness factor for unwarrantable failure closure orders by relati to failure to abate orders authorized under section 104(b) of the 19

> Like the failure to abate closure order ... the unwarranted (sic) failure order recognizes that the law should not tolerate miners continuing to work in the face of hazards.... 10/

The legislative history thus explains and justifies the adoptio of the present tense in the statutory language of section 104(d): Congress deliberately restricted unwarrantable failure sanctions to extant conditions or practices discovered by the inspector because t

5/ Sen. Rep. No. 95-461, 95th Cong., 1st Sess. 48 (1977). Reprinte Senate Subcommittee on Labor, Committee on Human Resources, 95th Con 2d Sess., Legislative History of the Federal Mine Safety and Health of 1977 at 1326. (Leg. Hist., 1977 Act).

6/ Legislative History of the Federal Coal Mine Health and Safety 1969, 94th Cong. 1st Sess. (Comm. Print 1975)(Leg. Hist., 1969 Act) p. 1061.

7/ Id. at 872-73.

8/ Id. at 1511-1512.

9/ Leg. Hist., 1977 Act, 620.

10/ Leg. Hist., 1977 Act, 619.

addressing the proper definition of "unwarrantable failure" are entirely consistent with this Congressional view. Westmoreland Coal Co., 7 FMSHR 1338 (1985); United States Steel Corp., 6 FMSHRC 1423 (1984). "[A]n unwarrantable failure to comply may be proved by a showing that the violative condition or practice was not corrected or remedied, prior to issuance of a citation or order, because of indifference, willful intent, or a serious lack of reasonable care." 6 FMSHRC 1437. [Emphasi added].

B. Investigation vs. Inspection

A principal basis upon which the judges' decisions below have reste is the distinction between "investigation" and "inspection" as those terms are used in the 1977 Act. Section 104(a) citations can be issued on the basis of an inspection or investigation while section 104(d) sanctions are limited to violations cited in the course of an inspection only.

The words "inspection" and "investigation" are not separately defin in the Act. Therefore, these words must be interpreted and understood a having their contemporary, ordinary meanings. Furthermore, it is a comm accepted generalization that when people say one thing they do not mean something else. Thus, when Congress said "inspection", it did not mean "investigation" and vice versa. In this regard and contrary to the UMWA contention (UMWA brief at p. 10), the legislative history of the 1977 Ac clearly demonstrates that Congress made "fine distinctions" between "inspection" and "investigation" for purposes of the Act.

Senate Report No. 95-181 discusses the Secretary's subpoena powers under what ultimately became section 103(b), 30 U.S.C. § 813(b), and sta "This authority is limited to investigations and not inspections." 11/ Later, in the Senate floor debate, Sen. McClure sought to amend section 103(b) so that it would more clearly apply to investigations only, and n inspections. The ensuing colloquy between Sen. McClure and the principa authors of S. 717, Sens. Williams and Javitz, clearly indicates that by adopting the McClure amendment, all three obviously distinguished betwee "inspections" and "investigations" within the context of the 1977 Act. 1

The foregoing legislative history is fully explained by the ordinar meanings of the two terms. Against the background of federal oversight and regulation of mine safety and health, "inspection" is defined as "strict or close examination or survey to determine compliance," while "investigation" is defined as a "searching inquiry as to causes." 13/ Ordinarily, the use of different terms, as here, creates an inference that Congress intended a difference in meaning. This inference is

11/ Leg. Hist., 1977 Act, 615.

12/ Id. at p. 1091-92

the words together in sections 103(a), 104(a), (b), and (g)(1), 105(a) and 107(a), 30 U.S.C. §§ 813(a), 814(a), (b) and (g)(1), 815(a) and 817(a), it separated them with the disjunctive "or" rather than the conjuntive "and". The use of "or" clearly indicates that Congress did not intend these words to be considered interchangeable. Likewise when Congress limited the prohibition against advance notice to "inspections" in section 103(a), it did so in recognition of the different meaning of "inspections" and "investigations". 14/ Since an investigation, as defined, is an inquiry into causes, it follows upon an antecedent event which is known before the "investigation" can begi Therefore, it would be futile to bar advance notice of the Congression mandated follow-up to a mine accident. An "inspection", in contrast, the beginning of enforcement to determine if violative mine conditions and Congress wanted to bar advance notice to avoid operator efforts to disguise safety hazards.

Section 104(a) and (b) broadly confer citation and withdrawal order authority for violations believed to have been committed upon "investigation" or "inspection". The withdrawal sanction is limited t the operator's failure to abate after having been cited. Section 104(d)(1), however, is confined to violations found "upon any inspecti This provision read together with section 104(d)(2) provides for immed ate withdrawal authority without regard to abatement efforts for viola tions deemed to result from the operator's unwarrantable failure to co This is a significant extension of regulatory authority and by using t term "inspection" alone, Congress reserved and confined this authority to current existing violations which, because of their gravity or the operator's underlying failure to correct them require prophylactic min closure. Congress did not intend this authority to be used as a post hoc sanction for violations no longer extant or previously abated but later "found" during after-the-fact "investigations" as to their cause Moreover, Congress used the terms together six times in the Act. 30 U §§ 813(a), 814(a), (b) and (g)(1), 815(a) and 817(a). Congress' failu to do so in section 104(d)(1), therefore must be attributed to conscio

14/ See also section 110(e) 30 U.S.C. § 820(e), authorizing criminal penalties for advance notice of "inspections" only.

15/ The majority attaches some significance to the fact that Congress dropped a House-proposed definition of "inspection" from the 1969 Act, and then goes on to assume that the deletion somehow authorizes the issuance of unwarrantable failure sanctions at any time for past violations. (Majority slip opinion at pp. 8-9). I believe the reason for the deletion is much simpler than that. The definition was irrational. As judge Steffey wryly observed, the definition, if read literally, would have required an inspector to set up an underground larder to sustain him until his quarterly inspection of the entire mine was completed. Westmoreland Coal Co., Docket Nos. WEVA 82-304-R (May 4, 1983), quoted below at 8 FMSHRC 63.

choice [illegible] and an inquiry into the plain meaning of the [illegible] clear Congressional intent that investigations and inspections were be considered as distinctly different enforcement activities with equally distinct consequences.

Finally, the majority emphasizes that section 103(g) grants a plaining miner the right to an "inspection" and that the enforceme actions here were taken as a consequence of a section 103(g) compl While that is true as far as it goes, the activities engaged in by MSHA were investigative rather than inspectorial in nature. Furth the specific enforcement action complained of -- citing the operat under section 104(d) -- was undertaken by the sub-district manager he modified the initial citation 19 days after it was issued by th inspectors who responded to the miner's complaint.

One is left to conclude, therefore, that "inspection" now enc all enforcement activity the Secretary chooses to engage in: an in into past events, an examination of existing conditions, and all e internal review conducted by MSHA once the inspector leaves the mi premises. 17/ Under that rubric, I disagree with my colleagues th are "not required ... to decide the meaning of inspection ... for purposes under the Mine Act" (Majority Slip Opinion at P. 7). The

16/ The Court of Appeals for the District of Columbia recently a this principle of statutory construction in another case involvin Mine Act. Citing Rusello v. United States, 464 U.S. 16, (1983) t Circuit endorsed the proposition that where Congress includes lan in one section of a statute but omits it in another section of th Act it is generally presumed that Congress acts intentionally and posely in the disparate inclusion or exclusion. United Mine Work America v. Mine Safety and Health Administration, Docket Nos. 86- 86-1327 (D.C. Cir. July 10, 1987)(slip opinion at p. 19).

17/ The 19-day hiatus between the initial issuance of the sectio citation and its ultimate modification to a 104(d) citation would to confound the Secretary's own review procedures in 30 C.F.R. Pa Section 100.6 provides for pre-Commission review of citations and "issued during an inspection" and requires all parties desiring a and health conference to request one within 10 days after receipt citation or order. The regulations are silent with respect to mo tions to citations and orders. It is therefore conceivable that operator could waive his right to a conference on a 104(a) citat to be notified after the 10-day period has elapsed that the cita been modified to a section 104(d) citation or order. In such a cumstance the operator is lulled into forfeiting the opportunity present exculpatory evidence that might militate against the mod of a section 104(a) citation to a section 104(d) citation or ord The inevitable result of today's decision will be that operators defensively request conferences on all citations so as to avoid

C. Believes vs. Finds

Intertwined with the distinction between investigations and inspec tions under the Act is that between "believes" and "finds" within the constituent elements of section 104. Section 104(a) allows for the issuance of a citation whenever an inspector "believes" an operator has violated the Act or mandatory standards, whereas section 104(d) require that the inspector "find" a violation.

Both the Secretary and the UMWA argue that "finds" as used in sect 104(d) carries an adjudicative sense 18/ while NACCO argues that the te requires that the inspector "discover" the violation first-hand before section 104(d) citation or order may be issued. 19/

A search of the language and purpose of the Act, as well as the legislative history however, does indicate explicit intent on the part Congress to limit the application of section 104(d) to instances where violation in question is actually observed by the inspector. Indeed, c trary to the Secretary's and the UMWA's arguments, the legislative hist of the 1977 Act specifically equates "finds" with "observes" or "discov for purposes of section 104(d).

Senate Report No. 95-181 addresses the rationale for injunctions u section 108 of the 1977 Act, 30 U.S.C. § 818. The remedial injunction a new enforcement tool granted the Secretary by Congress in the 1977 Ac be used against "habitual or chronic" violators that don't respond to t citation, mandatory abatement and withdrawal order sanctions of section 104. 20/ The Senate Report is quoted at length because it has direct a dispositive bearing on the issues in this case:

18/ "It is patently clear from the language of section 104(d) itself that the word finds is used in that section in the adjudicative sense, meaning that the inspector must conclude that an unwarrantable violatio has occurred, not that he must literally discover an active, in-progres violation." Secretary's brief at p. 20 (emphasis added).

"Furthermore, under Judge Merlin's analysis, use of the word finds can only mean that an inspector must discover or "come upon" a violatio Only by interpreting find to mean conclude or determine can the provisi of 104(d) make any sense, as an effective enforcement tool." UMWA's br at pp. 4-5 (emphasis added).

19/ Brief of NACCO at p. 16. The majority endorses the position of th Secretary and the UMWA on this issue. (Majority slip opinion at p. 9). The "finding" of unwarrantable failure was made three weeks after the issuance of the original 104(a) citation by a sub-district manager who did not visit the mine, interview witnesses, examine the operator's records or consult with the issuing inspector. 8 FMSHRC 72. The two inspectors who did perform those activities, however, declined to "find unwarrantability even in the sense that that term is propounded by the

> The current scheme for enforcing the mine safety laws enables MESA to eliminate the dangerous conditions which are observed in the course of inspections either by requiring the abatement of the violation or, where warranted, by withdrawing miners from the dangerous situations. Having taken these steps, however, there are no current enforcement sanctions to insure continued compliance with the Act's requirements by the operator after abatement of the actual violations observed .... The new provision of section 109 of the bill is designed to deal with that gap in enforcement.
>
> It is in essence, a means by which the Secretary con (sic) obtain the correction of violations which habitually occur when the inspector is not present in the mine. The provision enables the court to infer from the repeated discovery of violations at a mine that the operator probably regularly permits such violations to occur at times when the inspector is not present at the mine. 21/ [Emphasis added.]

It should be noted that the "current scheme" and "current enforcem sanctions" of the 1969 Act to which the Senate Report refers are identi to the current scheme and sanctions of the 1977 Act insofar as section 104(d) is concerned. As noted above, section 104(d) was drawn almost verbatim from section 104(c) of the 1969 Act. (As will be discussed below, the same holds generally true for section 103(g), 30 U.S.C. 813(g), (miners' complaints) and its predecessor in the 1969 Act).

Had Congress sought to grant the Secretary the authority to impose 104(d) sanctions for violations that no longer exist when the inspector is present to observe them, it would have amended section 104(d) for that purpose. Instead, Congress devised injunctive relief to fill an acknowledged "gap in enforcement" with respect to violations not actuall observed by the inspector because he is not present at the mine. Sectio 108 constitutes extraordinary relief that is to be invoked only when oth statutory measures have failed. Nevertheless, its genesis, quoted above was the recognition by Congress that section 104(d) had limited applicat to violations still in progress during the Secretary's physical inspecti of the mine.

A conscious decision on the part of Congress to withhold the Secretary's authority to invoke section 104(d) sanctions for violations not observed by his inspectors is binding on this Commission as well.

Furthermore, the legislative history for section 104(e), 30 U.S.C. § 814(e), indicates clearly that Congress intended "finds" to mean

> occurs they are shut down.... He [the operator] can clean the slate up in 90 days by good behavior, or he can clean it up on the next inspection and show that there are no violations that exist. 23/ [Emphasis added].

Sen. Schweiker's explanation is even more clearly stated later in Senate Record:

> ...Once a withdrawal order has been issued ... and a subsequent inspection of the mine discloses another violation... a withdrawal order will be issued until the violation has been abated.... Subsequent to this, the operator is subject to further withdrawal orders ... each time a violation of a substantial and significant nature is discovered, until an inspection of the mine in its entirety discloses no violations ... which could significantly and substantially," etc. 24/ [Emphasis added].

The legislative history fully supports Judge Merlin's view that t inspector's first-hand observation of violations is a prerequisite to imposition of section 104(d) sanctions. In short, an inspector cannot under section 104(d) what he cannot "find", that is, observe or discov the course of his inspection. 25/ Clear judicial support for equating

22/ While section 104(e) is not before this Commission, our ultimate decision will carry implications for future "pattern of violations" enforcement. Sections 104(d) and (e) are completely analogous insofar as the inspection/investigation and believes/finds dichotomies are concerned. The majority's determination that section 104(d) sanctions can be imposed post hoc for violations no longer extant clearly implie that section 104(e) sanctions can be similarly imposed.

23/ Leg. History, 1977 Act at p. 1077.

24/ Id. at p. 1105.

25/ The majority cites two violations that might escape section 104(d sanctions -- failure to perform pre-shift examinations (30 C.F.R. 75.3 and health violations, such as excursions above the respirable coal du standard, that are determined by after the fact analysis of samples.

(Footnote continued)

sanctions with respect to past violations no longer extant at the time of his inspection and observation of current conditions.

II. The Interaction Between Section 104(d) Sanctions and Miners' Complaints

Concerns have been raised in this case that if inspectors cannot impose section 104(d) sanctions for past, but unobserved violations, th rights of miners under section 103(g) will be "emasculated". Oral argu ment at p. 57. Indeed, as the majority notes, this case arose from a citation issued in response to a section 103(g) complaint. The Confere Report on the 1977 Act, however, could not be more clear as to the inte action between section 103(g) and the ensuing sanctions allowed under t Act:

Fn. 25/ continued

Regarding the first example, section 75.303 requires not only that a pre-shift inspection be conducted but also that it be recorded in an examination book "open for inspection by interested persons." Failure to examine and then record would therefore be a violation continuing to the time the inspector arrives at the mine to inspect the books. He would be observing the continuing violation and would have available to him the unwarrantable failure sanction. Of course, failure to preshift but nevertheless misrepresenting that failure by "recording" it is an offense subject to the criminal sanctions of Section 110(f), 30 U.S.C. 820(f).

As for the second example, except for respirable coal dust sampling, the vast majority of sampling conducted for the purpose of determining compliance with health standards is conducted by MSHA inspectors themselves. See generally, Mine Inspection and Investiga- tion Manual, U.S. Department of Labor, Chapters III and IV (1978). Accordingly, when an inspector conducts the sampling to determine com- pliance with various health standards and then analyzes those samples or forwards them for laboratory analysis, he is at all times engaged in the "discovery" of a potential violation and, if the ultimate analysis proves noncompliance, he is authorized to cite under section 104(d) if the other elements of that section are met. It should also be noted that emerging technology increasingly provides instrumentation for instantaneous analysis and quantification of workplace toxics just as sound level meters provide instant quantification of workplace noise. Furthermore, with respect to the health standard specifically raised by the majority, the respirable coal dust standard, Congress has specifically fashioned a sanction for continuing noncompliance with the standard that verges on an unwarrantable failure to comply. Section 104(f) provides withdrawal order authority when an inspector finds that an operator has failed to reduce dust levels below the standard as evidenced by sample results, and when he further determines that additional time for abatement is not

> .... Accordingly, an operator who receives such a notice would do what is necessary to evaluate the situation and protect the miners who may be exposed from the dangerous situations. While this provision, in fact, gives the operators the opportunity to abate such dangerous conditions-its sole purpose [is?] to protect the health and safety of miners. 26/

The clear implication of the underlined sentence is that operators uch circumstances may "get away with" abating violations without being d when the inspector arrives but that the substance of protecting miner s precedence over the form of enforcement. In fact, what does the abov age mean other than that the Secretary is precluded from citing past, ed violations that give rise to section 103(g) complaints? Such a ing also reinforces the proposition that Congress intended "finds" ean "observes in the course of inspection" since section 107, 30 U.S.C. requires the inspector to "find" imminent danger just as he is require find" a violation under section 104(d).

Furthermore, the Conference Report goes on to state:

> The failure of the Secretary to notify the operator ... under this provision will not nullify any citation or order which may be issued as a result of the inspection in response to the [miner's] request ... even if such inspection discloses the existence of an imminent danger situation in the mine. 27/

The only logical explanation for this "hold harmless" language is if the operator has been notified and he abates prior to inspection annot be cited; whereas if he is not notified and therefore does not prior to inspection, he can be cited and cannot affirmatively d against the citation or order by arguing that the Secretary ed to notify him of the violation.

Moreover, section 103(g) had an analogous antecedent in the 1969 Act, S.C. § 813(g)(1970). That inspection in response to a miner's com- t was also part of the "current scheme" referred to in the Senate t quoted above. As such, section 104(d) sanctions were limited the 1969 Act to violations "observed in the course of [section)] inspections." Leg. Hist., 1977 Act, 627. Congress did not

Leg. Hist., 1977 Act, 1324 [emphasis added].

Id. at 1324 [emphasis added].

declares that mine operators "with the assistance of miners ha primary responsibility to prevent the existence of [unsafe and unhealthful] conditions and practices in ... mines." Section on to state that the purpose of the Act is "to require that ea of a coal or other mine and every miner in such mine comply wi [mandatory safety and health] standards." 30 U.S.C. §§ 802(e)

Thus, the operators' and the miners' responsibilities to the continued existence of unsafe and unhealthful conditions a tices derive directly from section 2 of the Act itself - not b and perhaps in spite of, the Secretary's various enforcement i and disincentivites used to encourage compliance. Given the S finite enforcement resources, section 2 explicitly acknowledge correction of hazardous conditions and practices will for the part depend upon the vigilant self-policing of mine safety and by operators and miners. As the UMWA states convincingly in

> The likely interaction of all parties involved in carrying out the enforcement of mine safety and health laws should be the highest priority of the Commission in fashioning its interpretation of section 104(d) in this case. Only by construing the statute with an eye toward that priority, will the proper determination be made. UMWA brief at p. 12.

The "likely interaction" of all parties is obviously aime prevention of hazards to miners and the prompt abatement of vi once they arise irrespective of the threat of sanctions. When the parties, the operator and the miner, for whatever reason will not "interact" to carry out their responsibilities under Congress has provided for Secretarial intervention under secti However, given the Conference Committee's view, above, as to level of interaction is to be circumscribed, 104(d) sanctions missible responses to 103(g) complaints aimed at past complet

Under the principles enunciated in section 2 of the Act, limitation on the Secretary's enforcement powers is appropria is no incentive for fostering the "interaction of all parties when one of the parties, the Secretary, is motivated more by than by the protection of miners when he issues a section 104 tion or withdrawal order for a hazard that no longer exists. is even more severely compromised when the operator's unilate to abate violations prior to the inspector's arrival is "rewa imposition of the more severe enforcement sanctions of sectio

threat to miner health and safety.

Practical Enforcement Problems Arising from Post Hoc Section 104(d) Sanctions

By reversing Judge Merlin and allowing the Secretary to issue retro-
ely the enforcement sanctions of section 104(d), the majority raises
mber of enforcement policy issues. Practical issues include the
ntial for constant recomputation of the 90 day probationary period
into section 104(d). The majority dismisses this "time sequence"
lem by arguing that it doesn't arise on review and thus need not be
idered here. (Majority Slip Opinion at p. 7, fn. 6.) They err on
counts.

First, the "time sequence" issue raised by NACCO is not mere calendar
ulation; it is a substantive argument in favor of limiting section
d) citations and orders to existing violations actually observed by
nspector in the course of his inspection. NACCO correctly argues that
pplying section 104(d) to past, completed violations the 90 day pro-
onary period is "written out of the Act." NACCO brief at p. 22.
is because the majority's opinion allows the Secretary, through the
hoc imposition of section 104(d) sanctions, to reach back continuously
expired 90 day "clean" probationary periods previously considered to
nwarrantable failure free. This argument is inextricably linked to the
sent tense", "finds" vs "believes", and "inspection" vs "investigation"
ments, discussed above. They all center on the proposition that the
ion 104(d) chain is a prospective sanction that starts with a presently
rved unwarrantable failure violation and becomes progressively more
re as subsequent unwarrantable failure violations are observed during
ensuing 90 day period.

Second, the "time sequence" issue is before the Commission on the
s of the facts of this case. The violation was alleged to have
rred on May 30, 1985. It was cited by the inspectors under section
a) on June 5, 1985. The section 104(a) citation was modified to a
ion 104(d)(1) citation by the subdistrict manager on June 24, 1985.
which of the three dates does the 90 day probationary period run?
he Secretary can retroactively "find" an unwarrantable failure
ation 25 days into the past, doesn't it follow that the operator
ld be credited with those same 25 days toward the 90 day probationary
od? If not, doesn't the majority's decision actually establish
0 day probationary period under section 104(d)? These are legitimate
tions that can not be deferred to another day since NACCO has explicitl
ed them in this appeal. Furthermore, as the majority is obviously
king new ground with this decision, clear guidelines as to future
rcement procedures must be articulated in this case. Obviously, if

UMWA brief at p. 12.

9 FMSHRC ____ (Sept. 30, 1987) and Greenwich Collieries, Docket Nos. PENN 86-33 and PENN 85-188 et al., 9 FMSHRC ____ (Sept. 30, 1987), all just such enforcement actions. As argued above, since the violation no longer exists, the withdrawal order is not issued for the purpose of protecting miners; no hazard is present at the time of issuance. This, d Congressional statements to the effect that such orders are necessary as to prevent "miners continuing to work in the face of hazards." 30/

If, as the Secretary suggests, the withdrawal order is issued "to a message" 31/ or, in the terminology of the majority, for its "deterr effect", then section 104(d) curiously takes on the trappings of a civ penalty closure order.

Both the Senate and House bills that gave rise to the 1977 Act in such an order. Leg. History, 1977 Act at pp. 159 and 237. Its purpos not the protection of miners but was purely punitive. The order, howe could only be imposed by the Commission after a full hearing. After d deliberation, Congress rejected the civil penalty closure order. What Congress was unwilling to delegate legislatively to the Secretary cann be delegated judicially by this Commission.

If as the UMWA argues 32/, the withdrawal order can be terminated simultaneously with its issuance, the enforcement mechanism of section 104(d) becomes a dead letter, a "nonclosure" closure order. No one is

29/ Aside from the uncertainty now introduced into the computation of 90 day probationary period, there is now also a general lack of tempor restraint on the Secretary in applying section 104(d) sanctions, parti section 104(d) orders. In two cases decided today, the violations are alleged to have occurred as short as one hour (White County Coal Corp. infra) and as long as 13 months (Greenwich Collieries, infra) before issuance of the orders.

30/ Leg. Hist., 1977 Act, 619.

31/ "We close that section of the mine; we cut off production, send a message to everyone involved - from the miners to the operators - that we are not going to tolerate this kind of activity.... I would probab close it until the next clean inspection, yes ... The Commision has of paid due deference to the Secretary's interpretation of his enforcemen mandates." Statement of Solicitor of Labor Salem, oral argument, December 16, 1986 at pp. 18-20.

32/ Statement of Mr. Meyers for UMWA, oral argument, December 16, 198 at pp. 31-32.

and the credibility of the entire enforcement mechanism becomes subse to an obviously formalistic exercise.

Finally, if as the Secretary alternatively suggests, 33/ the with drawal order is issued for the purpose of training miners in such area as roof control and ventilation as a means of abatement, two problems arise. First, the Secretary did not allege a violation of the traini regulations that would warrant such a means of abatement. Second, th miners that are withdrawn as a result of the order may not be the mine that were present in the area when the violation is alleged to have occurred. In either event the remedial basis for the order is inappos with respect to the violation charged. 34/

IV. *The Underlying Policy of Section 104(d).*

What is most disconcerting about the enforcement policy now bles by the majority is its adverse effect on the Act's fundamental philos of voluntary compliance. What compliance incentives exist when a min operator and his workforce who currently maintain a commendable safet performance can be brought under the heavy hand of section 104(d) enf ment for errors alleged to have been committed weeks or months in the past? 35/ Indeed, given the unlimited retroactivity inherent in the majority's holding, section 104(d) sanctions are now authorized again a current management and workforce that may not even have been involv in the past completed violation. Particularly galling will be the re active issuance of withdrawal orders for violations that posed no con ceivable threat to miner health and safety even when they first occur (e.g., recordkeeping violations). Only the first violation in a sect 104(d) chain need be both significant and substantial and caused by u rantable failure to comply; subsequent withdrawal orders in the chain need only allege unwarrantability.

33/ Statement of Solicitor Salem, oral argument, December 16, 1986 a p. 21.

34/ These arguments are particularly true with regard to the Majorit decision today in White County Coal Corp., supra, wherein the means o abatement was the retraining of miners as to the requirements of the operator's roof control plan. Indeed, if in this case and in White County Coal Corp., the Secretary had alleged inadequate training as t basis of the violations (as, apparently, it was) and had cited under section 104(a), the deterent effect of enforcement espoused by the majority would still have been achieved. Production would have been stopped for the period of time needed to abate the violation, i.e., until the miners in question had been reinstructed in the hazards of going under unsupported roof. In such a scenario the true purposes o the Act would have been served within the limitations placed on the Secretary by Congress with respect to past completed violations not observed by inspectors in the course of their inspections.

Furthermore, the carefully formulated enforcement sch
104(d) is seriously undermined by today's decision, for de
protests to the contrary, the majority has effectively jet
90 day probationary period central to the operation of sec
the Act. Logic dictates that the 90 day probationary peri
104(d) can only be imposed prospectively in response to an
lation that poses a discrete hazard to miner health or saf
evidences an operator's "continuing indifference, willful
serious lack of reasonable care," U.S. Steel, supra. In
ment regimen, both management and miners are unequivocally
that any future violation, regardless of its seriousness,
from an unwarrantable failure to comply will result in a s
drawal order. By law the triggering citation is posted fo
and miners to see. The threat of a withdrawal order hangs
of Damocles over every shift and every section for the ens
Safety and health awareness is heightened as the attention
is focused on avoiding the adverse economic and productivi
of unwarrantable failure violations. These practical yet
incentives cannot but have a salutary effect on maintainin
more healthful workplace as the probationary period progre
the prospectively applied probationary period has definiti
immediacy and practical consequences for those who must wo
and establish a habit of compliance.

Though I hesitate to characterize the Mine Act's enfo
in criminal law terms, the obvious and primary purpose of
is rehabilitative. The majority's holding however would p
the rehabilitative function of the probationary period by
Secretary to reach back continuously into the past to rest
clock. In such circumstances the Sword of Damocles may ne
Once that point is reached, the credibility of the enforce
is severely compromised, the incentive to voluntary compli
and bald harrassment becomes inevitable.

In summary, I do not hold with the majority's view th
can impose section 104(d) sanctions for prior completed vi
observed by his inspectors. Congress explicitly declined
such authority. Indeed, the legislative history on point
that section 104(d) was reserved by Congress for violation
the inspector in the course of his inspection.

The inspector may, nevertheless, cite the operator un
104(a) of the Act if upon "investigation" he "believes" a
not witnessed by him, has occurred. There is more than su
"deterrent effect" in the civil penalty sanctions associat
104(a) as witnessed by the $5000.00 civil penalty assessed
Merlin in this case. Therefore, I would affirm his decisi

Vicki Shteir-Dunn, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Mary Lu Jordan, Esq.
United Mine Workers of America
900 15th St., N.W.
Washington, D.C. 20005

Thomas W. Meyers, Esq.
United Mine Workers of America
56000 Dilles Bottom
Shadyside, Ohio 43947

Timothy M. Biddle, Esq.
Thomas C. Means, Esq.
Paul W. Reidl, Esq.
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004

R. Henry Moore, Esq.
Buchanan Ingersoll
58th Floor, 6700 Grant Street
Pittsburgh, PA 15219

Chief Administrative Law Judge Paul Merlin
Federal Mine Safety & Health Review Commission
1730 K Street, N.W.
Washington, D.C. 20006

	:	LAKE 86-5
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY: Backley, Doyle and Nelson, Commissioners

This proceeding arises under the Federal Mine Safety and H Act of 1977, 30 U.S.C. § 801 et seq. (1982), and presents us wi issue, similar to that decided by us this date in Nacco Mining C 9 FMSHRC ___, Docket Nos. LAKE 85-87-R and 86-2 (September 30, May the Secretary of Labor, in the course of an inspection, issu pursuant to section 104(d) of the Mine Act, 30 U.S.C. § 814(d), upon a violation that is detected after the violation has ceased exist? 1/ Commission Administrative Law Judge Gary Melick held

---

1/ Section 104(d) states:

> (1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this [Act]. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an autho-

of White County Coal Corporation ("White County"), an underground c
mine located in southern Illinois. During the inspection, he obser
chalk line drawn for centering purposes on the unsupported roof of
No. 6. The chalk line extended from the last row of permanent supp
to the face for a distance of thirteen feet. Inspector Kaak was no
present when the chalk line was drawn and he observed no one under
unsupported roof. However, the coal drill operator admitted to the
inspector that he had drawn the chalk line and had walked under
unsupported roof to do so, even though he had seen a red flag warni
the danger. 8 FMSHRC at 922.

Inspector Kaak issued a section 104(d)(1) order of withdrawal
White County, alleging an unwarrantable failure violation of mandat
safety standard 30 C.F.R. § 75.200. 2/ This violation was alleged

---

> rized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
>
> (2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

30 U.S.C. § 814(d)(1) & (2).

2/ 30 C.F.R. § 75.200 provides in part:

> No person shall proceed beyond the last permanent support unless adequate temporary support is

affidavit, the chalk line had been drawn one hour before he det violation. The inspector terminated the order twenty-five minu later, after the miners were reinstructed on the roof control p

During a subsequent regular quarterly inspection of the m February 12, 1986, Inspector Kaak observed footprints under uns roof in the crosscut between the No. 6 and 7 entries. Again, t inspector did not observe anyone under the unsupported roof nor able to obtain further information about the incident. The ins issued a section 104(d)(2) order of withdrawal to White County another unwarrantable failure violation of section 75.200 (n. 2 This violation was alleged in a section 104(d)(2) order because preceding issuance of the section 104(d)(1) order. 30 U.S.C.§§ (1) & (2). This order was terminated approximately one hour af was issued.

White County contested both orders and challenged the unw table failure findings. White County moved for summary decisio arguing that the orders were invalid because they were not issu upon findings of existing violations. Relying on certain unrev Commission administrative law judges' decisions, including two decisions that we reverse today, 3/ Judge Melick held that sect 104(d) orders cannot be issued based upon findings of violation occurred in the past but no longer exist when detected by the i 8 FMSHRC at 923. The judge found that the inspector did not obs violations being committed and based the section 104(d) orders evidence of past violations. Id. Therefore, the judge granted County partial summary decision, modified the section 104(d) or section 104(a) citations, 30 U.S.C. § 814(a), and ordered the p confer regarding the desirability of further proceedings. 8 FM 923-24. Thereafter, White County advised the judge that it did to contest the citations further, and the judge dismissed the c 8 FMSHRC 994 (June 1986)(ALJ). We granted the Secretary of Lab petition for discretionary review and heard oral argument.

In Nacco, supra, we addressed the closely related questio whether an inspector may issue a citation under section 104(d)(violation not in existence at the time of its detection by an i We held that the enforcement sanctions of section 104(d) are no restricted to existing violations observed by the inspector. R these sanctions are to be applied to violations caused by the o unwarrantable failure to comply with mandatory standards -- reg of whether they are in existence at the time of detection. Nac

---

provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. ...

this conclusion on the text of section 104(d), its legislative histo
the section's purpose of deterrence, and the overall scheme of the M
Act. Id. We emphasized the importance of unwarrantable failure
findings within the context of the graduated enforcement scheme of
section 104(d) that provides "increasingly severe sanctions for
increasingly serious violations or operator behavior." Nacco, slip
at 5, quoting Cement Division, National Gypsum Co., 3 FMSHRC 822, 82
(April 1981). We held:

> The threat of th[e] "chain" of citations and orders under section 104(d) provides a powerful incentive for the operator to exercise special vigilance in health and safety matters because it is the conduct of the operator that triggers section 104(d) sanctions, not the coincidental timing of an inspection with the occurrence of a violation. Indeed, Congress viewed section 104(d) as a key element in the overall attempt to improve health and safety practices in the mining industry. ... To read out of the Act the protections and incentives of section 104(d) because an inspector is not physically present to observe a violation while it is occurring distorts the focus and blunts the effectiveness of section 104(d). We discern no warrant for such a formalistic approach.
>
> * * * *
>
> Throughout section 104(d), enforcement action is consistently linked to the inspector's determination that a violation has resulted from the operator's unwarrantable failure to comply with a mandatory standard. The focus in section 104(d) is constantly upon the operator's conduct in failing to comply with the cited mandatory standard, not upon the current detection and existence of the violation.

Slip op. at 6 (citations omitted; emphasis in original).

Although the present case involves section 104(d)(1) and (2)
orders, whereas Nacco involved a section 104(d)(1) citation, the rea
that led us to conclude that 104(d) citations could be issued for pr
violations not detected by the inspector at the time of occurrence a
to orders issued under sections 104(d)(1) and (2) as well. Those
reasons apply whether a citation or order is involved because the fo
of section 104(d) is upon unwarrantable failure by the operator not
whether its detection occurs concurrently with its commission. Furt
section 104(d) orders are the procedural vehicles both specified and
required by the Mine Act for alleging violations involving unwarrant
failure once a section 104(d)(1) citation has been issued. Therefor

With respect to the chalk line violation in this proceeding, th inspector issued the contested section 104(d)(1) order within one hou after learning that the coal drill operator had proceeded under unsupported roof. The dangers of unsupported roof are well documente and the violation in this case, proceeding under unsupported roof, is the type of violation that is unlikely to occur in the presence of an inspector. See Nacco, slip op. at 7. The same considerations apply with respect to the subsequent footprint violation. Such violations will ordinarily be detected by an inspector only after they have occurred. Under the rationale adopted by the judge, however, such unwarrantable conduct would not be subject to the unwarrantable failur sanctions mandated by the Mine Act.

To the extent that the judge's decision rests upon a conclusion that only the term "inspection" appears in section 104(d) (as opposed the use of both "inspection" and "investigation" in section 104(a)) an that the term inspection is limited to detection of presently existing events only, we reject that rationale. First, the orders issued in th case arose from a section 103(i) "spot" inspection and from a regular quarterly inspection and, more importantly, as we held in Nacco, the term inspection is broad and includes inquiry into past as well as present events. Nacco, slip op. at 7-8.

4/ See Greenwich Collieries, Div. of Pennsylvania Mines Corp., 9 FMSHRC ___, slip op. at 6, Nos. PENN 85-188-R, etc. (September 30, 1987), as to the Secretary's policy regarding withdrawal of miners from a mine in those instances where section 104(d) orders are

We therefore reverse the judge and vacate his modification o section 104(d) orders to section 104(a) citations. Because the ju held that these orders were not properly issued under section 104(did not reach the question of whether the alleged violations occur a result of the unwarrantable failure of the operator to comply wi C.F.R. § 75.200. Therefore, we remand the matter to the judge for further proceedings consistent with this decision.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

involved a question of law raised by White County concerning whether an MSHA inspector properly could issue orders pursuant to section 104(d) of the Mine Act alleging violations that had occurred but were no longer in existence at the time of the MSHA inspection. The judge concluded that because "the inspector did not observe any violations being committed but ... based his issuance of the [section] 104(d) orders ... upon evidence of past violations", the orders were not properly issued pursuant to section 104(d). 8 FMSHRC at 923. Accordingly, the judge modified the orders to section 104(a) citations. Id.

I agree with the majority that the judge's conclusion on the questio of law at issue was erroneous and that a remand for further proceedings is necessary. I write separately in order to set forth the basis for my conclusion in the context of the particular circumstances of this case.

In ruling on motions for summary decision the facts must be viewed in the light most favorable to the opposing party. United States v. Diebold, Inc., 369 U.S. 654 (1962). See 6 Moore's Federal Practice, § 56.15[8] (1985). Cast in this light, the factual background underlying the question of law before us can be summarized as follows. On February 6, 1986, an MSHA inspector was conducting an inspection at White County's mine pursuant to section 103(i) of the Mine Act. 1/ While conducting this inspection the inspector observed a chalk line drawn on the roof of the mine in Room No. 6. The chalk line extended from the last ro of roof support bolts to the coal face, a distance of about 13 feet. The miner who operated the coal drill admitted that he had drawn the chalk li and that in doing so he had placed himself under unsupported roof. 2/ Th

1/ Section 103(i) provides:

> Whenever the Secretary finds that a coal or other mine liberates excessive quantities of methane or other explosive gases during its operations, or that a methane or other gas ignition or explosion has occurred in such mine which resulted in death or serious injury at any time during the previous five years, or that there exists in such mine some other especially hazardous condition, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine during every five working days at irregular intervals....

30 U.S.C. § 813(i).

2/ The chalk line served as a guide to ensure that the coal face would be advanced in its intended direction. See e.g., Deposition of Darrell Gene Marshall at 4.

The MSHA inspector issued an order pursuant to section 104(d)(1) the Mine Act charging the operator with a violation of section 75.200 and finding that the violation resulted from an unwarrantable failure on the part of the operator to comply with the standard. 3/

Six days later, on February 12, 1986, the same MSHA inspector was conducting a regular quarterly inspection of the same mine. During th inspection the inspector observed footprints on the mine floor in an area of a crosscut that lacked roof support. The inspector was unable to obtain information enabling him to attribute the footprints to a pa ticular miner. He concluded, however, that the footprints established that a miner had been under unsupported roof in violation of 30 C.F.R § 75.200. Because the inspector further found that the violation was caused by White County's unwarrantable failure, and because he had iss a section 104(d)(1) order six days previously, this second violation c section 75.200 was alleged in an order issued pursuant to section 104 30 U.S.C. § 814(d)(2). (The text of section 104(d)(1) and (2) is set in footnote 1 to the majority opinion).

The legal challenge raised by the operator against the issuance o both orders is that because the inspector did not observe the violati being committed, i.e., he did not actually witness miners proceeding u unsupported roof but saw only physical evidence that they had done so violations could not be charged in orders issued pursuant to section In another decision issued this date, the Commission has considered an rejected a challenge to the Secretary of Labor's authority to issue citations pursuant to section 104(d)(1) for violations that occurred are not in existence so as to be observable at the time of an MSHA inspection. Nacco Mining Co., FMSHRC Docket Nos. LAKE 85-57-R, etc., September 30, 1987 (majority and concurring opinions). As explained below, White County's challenge to the issuance of orders pursuant to section 104(d) must be rejected for similar reasons.

First, as in Nacco, part of the argument advanced by the operato accepted by the administrative law judge concerns the presence of the "inspection" and the absence of the word "investigation" in section 1 and the resulting impact, if any, on the Secretary's authority to cha violations under section 104(d) based on the results of an "investiga As was the case in Nacco, it is unnecessary to address this question the present case. Section 104(d) provides that an MSHA inspector can undertake the enforcement action specified therein "upon any inspecti a ... mine." 30 U.S.C. § 814(d)(1)(emphasis added). The two section 104(d) orders at issue in the present case were issued by the MSHA inspector upon a section 103(i) spot inspection and a section 103(a)

3/ An order was issued pursuant to section 104(d)(1) because a cita had been issued to the operator, within the preceding 90 days, for a violation that MSHA found to be a significant and substantial violati

regular quarterly inspection, respectively. Therefore, the ques
whether MSHA can proceed under section 104(d) based upon the fruits
"investigation" is not presented by this case and properly is left
case in which that issue actually is presented. Nacco, slip op. at
(concurring opinion).

Second, because White County's arguments concerning the gramma
structure of section 104(d) parallel those of the operator in Nacc
reject them for the reasons stated in my concurring opinion in Nacc
In particular, I conclude that a plain reading of section 104(d) pe
mits the Secretary to cite the operator thereunder for violations t
occurred prior to an MSHA inspector's arrival at the mine as well a
violations actually observed by the inspector. Nacco, slip op. at
16 (concurring opinion).

Third, as in Nacco, no damage is done to the enforcement logic
lying section 104(d) by upholding the Secretary's right to proceed
section 104(d) in citing the violations at issue. The distinguishi
characteristic of section 104(d) is its focus on the operator's con
in connection with a violation, i.e., did the operator act "unwarra
The nature of this inquiry and the manner in which it is determined
the same regardless of whether an MSHA inspector is present to obse
the violative conduct. Nacco, slip op. at 17-18 (concurring opinio
Furthermore, an important safety purpose is served by upholding tho
Secretary's right to direct one of his "most powerful instruments f
enforcing mine safety" against violative conduct occurring out of t
sight of an MSHA inspector. Id. at 18-19, quoting UMWA v. FMSHRC &
Energy Corp., 768 F.2d 1477, 1479 (D.C. Cir., 1984). As is the cas
an observed violation, applying section 104(d)'s enforcement scheme
unobserved violations will serve to forcefully dissuade repetition
violative conduct. Id.

Fourth, no practical problem is presented by upholding the Sec
right to proceed under section 104(d) in the circumstances of the p
case. Even before the issuance of the section 104(d) orders challe
the operator already was under a section 104(d) probationary chain.
supra (concurring opinion). The inspector's issuance of the first
104(d) order for a violation that the drill operator admitted he ha
committed, and the issuance of the second section 104(d) order six
for a violation that apparently had occurred only shortly before th
tor's arrival (see Deposition of MSHA inspector at 7), present none
dire consequences claimed to be caused by permitting the citation u
section 104(d) of violations not actually observed at the time of t
commission. See, e.g., White County's brief at 13-17. Prior to th
ance of the orders contested in this case, the operator knew that i
on a section 104(d) chain and was aware of the consequences that wo
from repetition of further unwarrantable violations. The violation
to have been caused by the operator's unwarrantable failure were ci
the inspector almost immediately after their occurrence. As was th
Nacco, when measured against the record before us, the greater f

ion 104(d)(1) citation. Here, the MSHA inspector issued section (1) and section 104(d)(2) orders. The course of the inspector's ement actions, however, was dictated by the statutory scheme, not by rcise of discretion on his part. Once the inspector made the findings rth in section 104(d) concerning the existence of the violations and ture of the operator's conduct in connection with the violations, his ce of orders pursuant to section 104(d) was mandated by the Mine Act. whether a citation or an order is to be issued under section 104(d) is ined solely by whether and where the operator is on a section 104(d) ionary chain, and the facts surrounding the violation. Insofar as the riate extent of the withdrawal of miners caused by the issuance of an is concerned (See slip op. at 5 n.6 (majority opinion)), section (1) provides that the withdrawal order shall cover "all persons in ea affected by such violation." 30 U.S.C. § 814(d)(1). The record present case provides absolutely no indication that the inspector's se of his authority to order withdrawal based on the violations at exceeded proper bounds. See, e.g., Oral Arg. Tr. at 5-6.

ccordingly, I concur in the majority's reversal of the administrative dge's grant of partial summary judgment and the remand for further riate proceedings.

James A. Lastowka
Commissioner

(Sept. 30, 1987), I would affirm the decision of Administrati
Judge Melick in this case. That dissent is, therefore, incorporate
reference herein. In my view, the Mine Act does not authorize the
of any unwarrantable failure sanctions, be they citations in Nacco
drawal orders here, when the violations in question are past, compl
not observed by the issuing inspector.

Furthermore, as noted at p. 35 of my dissent in Nacco, supra,
safety and health purposes would have been served, within the statu
work, if the violations in this case had been cited under section 1
30 U.S.C. 814(a). Production would have been interrupted until the
miners had been reinstructed in proper procedures regarding unsuppo
Here, the imposition of one of the Secretary's more formidable enfo
tools served no additional purpose other than the hollow castigatio
mine operator.

Accordingly, I dissent.

Ford B. Ford
Chairman

ice of the Solicitor
Department of Labor
6 Wilson Blvd.
ington, Virginia 22203

y Lu Jordan, Esq.
ted Mine Workers of America
15th St., N.W.
hington, D.C. 20005

mas W. Meyers, Esq.
ted Mine Workers of America
00 Dilles Botton
dyside, Ohio 43947

othy M. Biddle, Esq.
mas C. Means, Esq.
l W. Reidle, Esq.
vell & Moring
1 Pennsylvania Ave., N.W.
hington, D.C. 20004

Henry Moore, Esq.
hanan Ingersoll
h Floor, 6700 Grant St.
tsburgh, Pennsylvania 15219

inistrative Law Judge Gary Melick
eral Mine Safety & Health Review Commission
3 Leesburg Pike, Suite 1000
ls Church, Virginia 22041

September 30, 1987

EMERALD MINES CORPORATION	:	
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket No. PENN 85-298-R
and	:	
UNITED MINE WORKERS OF AMERICA (UMWA)	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY: Backley, Doyle and Nelson, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), and involves the issuance of a citation pursuant to section 104(d)(1) of the Mine Act by an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") as a result of an inspection conducted pursuant to section 103(g)(1) of the Act. 1/ Commission Administrative Law Judge

---

1/ Section 104(d)(1) states:

> If, upon an inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such findi

issued because the cited violative event had occurred several da
before the inspector visited the mine. The judge concluded that
because the inspector had been engaged in an investigation of a
event rather than in an inspection of an existing condition, onl
section 104(a) citation could be issued. 8 FMSHRC 324 (March
1986)(ALJ). The Commission granted the petition for discretiona
review filed by the United Mine Workers of America ("UMWA") and
oral argument. In another case decided this date, Nacco Mining
9 FMSHRC __, Docket Nos. LAKE 85-87-R and 86-2 (September 30, 19
concluded that the Mine Act permits the issuance of a section 10
citation under circumstances similar to those presented in this
ceeding. For the reasons set forth in Nacco, we reverse and rem

The essential facts are not in dispute. On July 30, 1985,
Inspector Joseph Koscho received a complaint pursuant to section
103(g)(1) of the Mine Act (n. 1 infra). The complaint alleged t

---

> within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(d)(1).

Section 103(g)(1) provides in part:

> Whenever a representative of the miners or a miner in the case of a ... mine where there is no such representative has reasonable grounds to believe that a violation of this [Act] or a mandatory health or safety standard exists, ... such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation.... Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this [Title]. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or

Emerald Mines ... in Pennsylvania.

On July 31, 1985, Inspector Koscho went to the mine and re records with respect to the methane detectors and interviewed mi were present when the alleged methane accumulation occurred. On 1, 1985, the inspector visited the site of the alleged accumulat tested for methane, and found only a small amount. He also test methane monitor on the continuous mining machine used on July 29 found it to be working. However, on the basis of statements of whom he interviewed, the inspector determined that on July 29 th been a violation of mandatory safety standard 30 C.F.R. § 75.308 following the detection of methane accumulations of 2.5% to 2.6% 002 section, the continuous mining machine was not immediately d energized while changes were being made in the ventilation of th working places. 2/

On August 8, 1985, the inspector issued to Emerald a citat pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), a violation of section 75.308. The inspector also designated th violation as being of a "significant and substantial" nature. O 24, 1985, at the direction of his supervisor, Inspector Koscho m the citation to a citation issued pursuant to section 104(d)(1) Act to reflect MSHA's assertion that the violation was caused by Emerald's unwarrantable failure to comply with section 75.308.

Emerald contested the propriety of the section 104(d)(1) c essentially on the basis that it was issued for a violation that longer existed when detected by the MSHA inspector. Emerald the the civil penalty proposed by the Secretary for the alleged viol In his decision, the judge found that Emerald's payment of the p penalty waived any contest of the violation itself and of the si cant and substantial finding. 8 FMSHRC at 325. However, the ju found that Emerald had tendered its payment under the mistaken impression that the citation was issued pursuant to section 104(the Act rather than section 104(d)(1). The judge ruled that, in ness, and to avoid any future detriment to the operator stemming inaccurate record of its history of violations, Emerald's challe

---

2/ 30 C.F.R. § 75.308 states in part:

> If at any time the air at any working place, when tested at a point not less than 12 inches from the roof, face, or rib, contains 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation in such mine so that such air shall contain less than 1.0 volume per centum of methane. While such changes or adjust-

through subsequent interviews and the examination of records several days later. 8 FMSHRC at 328. This conclusion resulted from the judge's view that inspections pertain only to examinations of existing conditions and investigations pertain only to past events. Id. The judge then modified the section 104(d) citation to a citation issued pursuant to section 104(a) of the Act and dismissed the case. 8 FMSHRC at 328-29. We conclude that the judge erred.

We have held today in Nacco that the enforcement sanction of a section 104(d) citation is not restricted to existing violations observed by the inspector. Rather, a citation issued pursuant to section 104(d)(1) may be applied to violations caused by the operator's unwarrantable failure to comply with mandatory standards -- regardless of whether the violations are in existence at the time that they are detected by an inspector. Nacco, slip op. at 5-10. We based this conclusion upon an examination of the text of section 104(d), its legislative history, the section's purpose of deterrence, and the overall enforcement scheme of the Mine Act. Id. We pointed specifically to the graduated enforcement scheme of section 104(d) that provides "increasingly severe sanctions for increasingly serious violations or operator behavior." Slip op. at 5, quoting Cement Division, National Gypsum Co., 3 FMSHRC 822, 828 (April 1981). We held:

> The threat of th[e] "chain" of citations and orders under section 104(d) provides a powerful incentive for the operator to exercise special vigilance in health and safety matters because it is the conduct of the operator that triggers section 104(d) sanctions, not the coincidental timing of an inspection with the occurrence of a violation. Indeed, Congress viewed section 104(d) as a key element in the overall attempt to improve health and safety practices in the mining industry. ... To read out of the Act the protections and incentives of section 104(d) because an inspector is not physically present to observe a violation while it is occurring distorts the focus and blunts the effectiveness of section 104(d). We discern no warrant for such a formalistic approach.
>
> * * * *
>
> Throughout section 104(d), enforcement action is

3/ No issue concerning this aspect of the judge's decision has been raised on review and we intimate no view as to the propriety of that ruling.

> that a violation has resulted from the operator's unwarrantable failure to comply with a mandatory standard. The focus in section 104(d) is constantly upon the operator's conduct in failing to comply with the cited mandatory standard, not upon the current detection and existence of the violation.

Slip op. at 6 (citations omitted; emphasis in original).

As noted in Nacco, many violations, by their very nature, unlikely to be observed until after they occur. Slip op. at 7. violation at issue in this case presents precisely such a situa The condition precedent to a violation of section 75.308 is the of 1% or more of methane in a working place. The transitory na methane accumulations and the vital necessity of immediately re the level below 1% makes it unlikely that an inspector would di violation of section 75.308 while it was occurring. Under the decision, such a past violation, even though caused by an opera unwarrantable failure, would escape the sanction and deterrent section 104(d), which is designed to address unwarrantable fail we concluded in Nacco: "Were we to agree with the approach ado the judge, the statutory disincentive for [such] operator misco would be lost." Slip op. at 7.

As we indicated in Nacco, the term "inspection" in sectio of the Mine Act is not limited, for purposes of that section, t observation of presently existing circumstances but includes in into past events as well. Slip op. at 7-8. The present case w initiated by a complaint of a possible violation made to MSHA p to section 103(g)(1) of the Act. That section provides to repr sentatives of miners the right to obtain an immediate "inspecti whenever the representative has reasonable grounds to believe t violation exists. We stated in Nacco:

> There is nothing in the language of section 103(g) that requires the violation to be ongoing when the inspector arrives at the mine site. As a practical matter, the violation may have been corrected shortly after the request of the miners' representative and before the inspector reaches the mine. Yet the inspector is nonetheless on an "inspection" and, if he finds that a violation has occurred, he may cite it using the full panoply of sanctions available under the Act.

Slip op. at 8.

Arguments similar to those advanced by the operator in Na concerning the meaning of "investigation" and "inspection," the of the term "finds" in section 104(d), and the asserted "passe

Accordingly, we reverse the judge and vacate his modification
the section 104(d) citation to a section 104(a) citation. Because th
judge held that the section 104(d) citation was not issued properly,
did not consider the merits of the unwarrantable failure allegation
included in the citation. Therefore, we remand this matter to the ju
for further proceedings consistent with this decision.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

In this case the administrative law judge granted a motion b
Mines Corporation for partial summary decision. Although Emerald
several alternative grounds upon which it believed summary decisi
appropriate, the sole basis articulated by the judge for his gran
motion was that because "the citation at bar was not based on an
of the mine but upon an investigation through subsequent intervie
examination of records conducted by the inspector several days af
incidents giving rise to the violation", the violation could not
erly cited under section 104(d). 8 FMSHRC at 328. See also Tr.
114-16. Accordingly, the judge modified the citation to one issu
pursuant to section 104(a) of the Mine Act. Id.

I agree with the majority that the judge's grant of partial
decision was erroneous. I write separately to set forth the basis
conclusion in the context of the particular circumstances of this

Although the judge concluded that the citation was not proper
pursuant to section 104(d) because it was not based "on an inspect
Emerald's mine, the record flatly contradicts his premise. It is
that the MSHA inspector was at Emerald's mine pursuant to a miner'
of an alleged violation of the Mine Act and his request for an ins
pursuant to section 103(g) of the Act. The miner's handwritten re
MSHA stated:

> July 30, 1985
>
> I am requesting a 103G [sic] at the Emerald Mine, Waynesburg Pa. of an incident that occured [sic] on July 29, 1985 in the 002 section on the 8am to 4pm shift.
>
> Amount of 2.6% [methane] was detected and the mine foreman did not take the appropriate action according to the law, but proceeded to make adjustments in air by pulling tubing out.

Exh. R-1.

Section 103(g) of the Mine Act, referenced in the miner's repo
MSHA, provides:

> Whenever a representative of the miners or a miner... has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be

> of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this title. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

S.C. § 813(g)(1)(emphasis added). Pursuant to this grant of statutory rity, the MSHA inspector conducted the requested inspection and, as ult, issued the contested citation. Therefore, the challenged enforce- action taken by the Secretary under section 104(d) was indeed taken an inspection" and the judge erred in finding otherwise.

Although the judge did not discuss any further rationale for his grant rtial summary decision, he did cite several administrative law judge ions, including that in Nacco Mining Co., 8 FMSHRC 59 (January 1986)(AL pport of his disposition. Today, the Commission has issued its decisio cco reversing the judge's decision relied upon by the judge in the pres In Nacco, the majority and concurring opinions extensively discuss th ns why, as a matter of law, it is not improper for MSHA to proceed unde on 104(d) for violations that occurred but no longer exist at the time MSHA inspection. Because the arguments raised by the operator in the nt case parallel, in all essentials, those raised and addressed in Nacc ect them for the reasons stated in my concurring opinion in Nacco, slip t 12-20.

I also note that in the present case, as in Nacco and White County Coal , FMSHRC Docket No. LAKE 86-58-R, etc., also issued this date, the d discloses no impediment to a logical application of the enforcement e provided for in section 104(d). The violation at issue was alleged ve occurred on Monday, July 29, 1985. It was reported to MSHA on ay, July 30th. On July 31st and August 1st the MSHA inspector conducte tion 103(g) inspection at the mine concerning the reported violation. gust 8th he issued a citation pursuant to section 104(a) of the Mine Ac citation also found the violation to be "significant and substantial". gust 24th, a further finding that the violation resulted from an unwar- ble failure on the part of the operator was made. All the necessary cates for a section 104(d)(1) citation being met, the citation accor- y was modified to a section 104(d)(1) citation. With the issuance of modification, Emerald was given timely notice that it was subject to

in remanding for further proceedings.

James A. Lastowka
Commissioner

(Sept. 30, 1987) I would affirm the decision of Administrative Law Melick. That dissent, therefore, is incorporated herein by reference. my view, sanctions issued pursuant to section 104(d), 30 U.S.C. 814(d) limited to ongoing violations actually observed by inspectors in the co of their inspections. Here, the citation, originally issued pursuant t section 104(a), 30 U.S.C. § 814(a), specified that it was based upon an investigation conducted in the course of several days after the violati was alleged to have occurred. Section 104(d) clearly limits unwarranta failure sanctions to those violations discovered in the course of inspe not investigations into past occurrences.

Furthermore, the facts of this case raise the same issues with res to the 90 day probationary period of section 104(d) as were raised in N supra. Here, the violation was alleged to have occurred on July 29, 19 It was charged in a section 104(a) citation issued August 8, 1985. Twe five days after the violation was alleged to have occurred, the citatio modified August 23, 1985, on orders from the issuing inspector's superi to allege unwarrantable failure under section 104(d).

As in Nacco, the majority gives no guidance as to how the 90 day p is now to be computed when the triggering citation can be issued post h even though Emerald specifically raises the issue. Brief at pp. 17-18

Does the probationary period begin on July 29, August 8, or Augus If, as the Secretary argues, the latter date is correct, the operator effect is subject to a 115 day probationary period and the statutory pe of 90 days is jettisoned. See generally, Nacco dissent, supra at pp.

Lastly, on the facts of this case, it is apparent that the term "inspection" has now been thoroughly elasticized to encompass all Secr tarial enforcement activity. The so-called finding of unwarrantabilit was in fact made by the issuing inspector's superiors who conducted no investigation let alone inspection with respect to the alleged violati Such transparent bootstrapping so as to impose the unwarrantable failu chain for a past abated violation seriously compromises the voluntary compliance philosophy of the Act. See Nacco dissent, supra, p. 26.

Accordingly, I dissent.

Ford B. Ford
Chairman

U.S. Department
4015 Wilson Blvd.
Arlington, Virginia 22203

Mary Lu Jordan, Esq.
United Mine Workers of America
900 15th St., N.W.
Washington, D.C. 20005

Thomas W. Meyers, Esq.
United Mine Workers of America
56000 Dilles Botton
Shadyside, Ohio 43947

Timothy M. Biddle, Esq.
Thomas C. Means, Esq.
Paul W. Reidle, Esq.
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004

R. Henry Moore, Esq.
Buchanan Ingersoll
58th Floor, 6700 Grant St.
Pittsburgh, Pennsylvania 15219

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

WASHINGTON, D.C. 20006

September 30, 1987

REENWICH COLLIERIES, DIVISION OF PENNSYLVANIA MINES CORPORATION	:	
v.	:	Docket Nos. PENN 85-188-R
	:	PENN 85-189-R
ECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	PENN 85-190-R
	:	PENN 85-191-R
	:	PENN 85-192-R
and	:	
NITED MINE WORKERS OF AMERICA (UMWA),	:	
ECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
and	:	
NITED MINE WORKERS OF AMERICA (UMWA)	:	
v.	:	Docket No. PENN 86-33
REENWICH COLLIERIES	:	

EFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

Y: Backley, Doyle and Nelson, Commissioners

This consolidated contest and civil penalty case arising under the ederal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. 1982), presents us with a question of law, similar to that decided this ate in Nacco Mining Co., 9 FMSHRC ___, Docket Nos. LAKE 85-87-R and 6-2 (September 30, 1987): May the Secretary of Labor, in the course of nvestigations, issue orders pursuant to section 104(d) of the Mine Act

Pennsylvania Mines Corporation ("Greenwich"), and located i
western Pennsylvania. Three miners were killed and eleven o
injured in the explosion. Representatives of the Department
Mine Safety and Health Administration ("MSHA") arrived at th
engaged in rescue and recovery efforts, observed conditions
and began an investigation of the cause of the explosion. A
its investigation, MSHA examined the entire mine between Feb
April 5, 1984, and between March 27 and April 27, 1984, took
statements from numerous individuals who participated in the
operations or who had information regarding the conditions i
prior to the explosion. The Secretary's investigators concl
the operator's unwarrantable failure to comply with five man

1/ Section 104(d)(1) provides:

> If, upon an inspection of a coal or other mine, an
> authorized representative of the Secretary finds
> that there has been a violation of any mandatory
> health or safety standard, and if he also finds
> that, while the conditions created by such violati
> do not cause imminent danger, such violation is of
> such nature as could significantly and substantial
> contribute to the cause and effect of a coal or
> other mine safety and health hazard, and if he fin
> such violation to be caused by an unwarrantable
> failure of such operator to comply with such
> mandatory health or safety standards, he shall
> include such finding in any citation given to the
> operator under this [Act]. If, during the same
> inspection or any subsequent inspection of such mi
> within 90 days after the issuance of such citation
> an authorized representative of the Secretary find
> another violation of any mandatory health or safet
> standard and finds such violation to be also cause
> by an unwarrantable failure of such operator to so
> comply, he shall forthwith issue an order requirin
> the operator to cause all persons in the area
> affected by such violation, except those persons
> referred to in subsection (c) of this section to b
> withdrawn from, and to be prohibited from entering
> such area until an authorized representative of th
> Secretary determines that such violation has been
> abated.

30 U.S.C. § 814(d)(1).

1985, MSHA Inspector Theodore W. Glusko issued to Greenwich the five section 104(d)(1) orders of withdrawal at issue in this case. The orders alleged that violations of various safety standards had occurred in December 1983 and January and February 1984. Each of the section 104(d)(1) orders indicated that they were based on a section 104(d)(1) citation issued to Greenwich on February 24, 1984. The orders also indicated that they were terminated at the time that they were issued. No miners were withdrawn from the mine as a result of the orders.

Greenwich contested the orders and subsequently filed a motion fo summary decision, arguing that the orders were not issued properly unde section 104(d) because the inspector had not observed the violations during an inspection but had concluded that the violations occurred based on MSHA's investigation after the violations had ceased to exist. In granting Greenwich's motion, the judge relied upon certain unreviewe decisions of Commission administrative law judges, including two decisions that we reverse today. 2/ He held that the orders were invalid "because an order issued under section 104(d) should be based o an inspection as opposed to an investigation and the above orders state on their face that the violations which had allegedly occurred are base on an investigation and no longer then existed." 8 FMSHRC at 1107. Consequently, the judge vacated the unwarrantable failure allegations included in the section 104(d) orders, modified the orders to citations issued pursuant to section 104(a), 30 U.S.C. § 814(a), and stated that further proceedings would be held to resolve the remaining issues. 8 FMSHRC at 1107. Greenwich's motion for summary decision also contended that the orders did not meet certain procedural prerequisites of sectio 104(d)(1) in that they were not issued within 90 days of the underlying section 104(d) citation and were not issued "forthwith." Given his disposition of the motion, the judge did not reach the merits of these contentions.

The Secretary of Labor, joined by the United Mine Workers of America, which intervened in the proceeding, filed with the Commission Petition for Interlocutory Review and a Motion to Stay Proceedings. We granted both the petition and the motion and heard oral argument. We conclude that the judge erred. In Nacco, supra, we set forth the prope interpretation and application of section 104(d). We held that the enforcement sanctions of section 104(d) are not restricted to existing violations observed personally by the inspector. Rather, these sanctions may also be applied to violations caused by the operator's unwarrantable failure to comply with mandatory standards -- regardless of whether the violations are in existence at the time of their detection. Nacco, slip op. at 5-10. Accord: Emerald Mines, infra, sl op. at 4-6. We based this conclusion on the text of section 104(d), i legislative history, the section's purpose of deterrence and the overa enforcement scheme of the Mine Act. We emphasized the importance of unwarrantable failure findings within the graduated enforcement scheme of section 104(d) that provides "increasingly severe sanctions for

increasingly serious violations or operator behavior." Nacc
at 5, quoting Cement Division, National Gypsum Co., 3 FMSHRC
(April 1981). We held:

> The threat of th[e] "chain" of citations and order
> under section 104(d) provides a powerful incentive
> for the operator to exercise special vigilance in
> health and safety matters because it is the conduc
> of the operator that triggers section 104(d)
> sanctions, not the coincidental timing of an
> inspection with the occurrence of a violation.
> Indeed, Congress viewed section 104(d) as a key
> element in the overall attempt to improve health a
> safety practices in the mining industry. ... To
> read out of the Act the protections and incentives
> of section 104(d) because an inspector is not
> physically present to observe a violation while it
> is occurring distorts the focus and blunts the
> effectiveness of section 104(d). We discern no
> warrant for such a formalistic approach.
>
> * * * *
>
> Throughout section 104(d), enforcement action is
> consistently linked to the inspector's determinat
> that a violation has resulted from the operator's
> unwarrantable failure to comply with a mandatory
> standard. The focus in section 104(d) is constant
> upon the operator's conduct in failing to comply
> with the cited mandatory standard, not upon the
> current detection and existence of the violation.

Slip op. at 6 (citations omitted; emphasis in original).

In addition, we rejected the suggestion that Congress
distinguish between enforcement actions based upon an inspe
those based upon an investigation, and held that inclusion
"inspection or investigation" in section 104(a) as compared
the term "inspection" alone in section 104(d) was without l
significance regarding enforcement pursuant to section 104(
at 7-8. We based this conclusion upon the fact that the te
defined in the Mine Act, and that "common usage does not li
meaning of 'inspection' to an observation of presently exis
stances nor restrict the meaning of 'investigation' to an i
past events." Slip op. at 8. The varied use of these term
Act and its legislative history also support this conclusio
at 8-9.

Although the present case involves orders issued purs

supra, in general and assuming the other prerequisites for their issuance have been met, "orders are the procedural vehicles both specified and required by the Mine Act for alleging violations involvi unwarrantable failure once a section 104(d)(1) citation has been issued." Slip op. at 4.

We noted in Nacco that many violations, by their very nature, a not likely to be observed or detected until after they occur. Slip o at 7. This is particularly so where the violation is a failure to act as required or where the violation causes or contributes to the event being investigated. Both types of violation are present here. Two o the section 104(d) orders allege a failure to conduct required mine examinations, one being the pre-shift examination of the active worki and the other being the weekly examination of the mine's ventilation system. These examinations are designed to monitor potentially hazardous conditions, including the accumulation of excessive levels methane. As such, they warn the operator of impending danger and are necessary to assure overall mine safety. Under the judge's decision, such critical violations, even though caused by an operator's unwarrantable failure, would escape the unwarrantable failure sanctio established by Congress.

The remaining contested orders allege an insufficient volume an velocity of air ventilating the mine, violations of the mine's approv ventilation system and methane and dust control plan, and a failure t take required precautions when making changes in mine ventilation. These allegations arose out of the inspection and investigation that Secretary was required to conduct in order to determine, among other things, the cause of the accident and whether there was compliance wi mandatory health and safety standards. 30 U.S.C. § 813. One purpose such inspections and investigations is to avoid future accidents. If the Secretary determines that violations contributing to an accident were caused by the operator's unwarrantable failure to comply with mandatory health and safety standards, citation of the violations pursuant to section 104(d) may deter future unwarrantable failure by operator to assure compliance with mandatory health or safety standar Congress did not intend to limit the inspectors' power to sanction unwarrantable operator conduct by removing from the purview of sectio 104(d) violations that occurred prior to a disaster but which were discovered only after the disaster. As we noted in Nacco, "[t]he foc in section 104(d) is constantly upon the operator's conduct in failin to comply with the cited mandatory standard, not upon the current detection and existence of the violation." Slip op. at 6. For purpo of section 104(d), Congress did not intend to make distinctions betwe the citation of past and presently existing violations when it used t words "inspection" and "investigation" in the Act. Slip op. at 7-8. Consequently, section 104(d) enforcement actions may result from "inspections" as well as "investigations."

considerations, no miners were withdrawn from the mine when the orde in this matter were issued. The Secretary asserts that under such circumstances the issuance of an order that does not require withdra is consistent with his enforcement policy. Tr. Oral Arg. 20-21. Th policy is appropriate in such circumstances and in no small way has persuaded us to conclude that the operator's due process argument on this issue is not well founded.

For the foregoing reasons, we reverse the judge's legal conclu that the orders here are invalid because they were issued based upon investigation and after the violations ceased to exist. As noted ab Greenwich also challenged the validity of the orders because they we not issued within 90 days of the section 104(d)(1) citation upon whi they were based and were not issued "forthwith." Slip op. at 3. Th judge did not reach these issues and on remand shall rule specifica on them. Further, there are other issues in this case regarding the merits of the alleged violations and the Secretary's unwarrantable failure allegations that should be resolved by the judge on remand.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

Commissioner Lastowka, concurring:

In this case the administrative law judge granted in part a motion Greenwich Collieries for summary decision. In its motion Greenwich chal the validity of five orders issued by MSHA pursuant to section 104(d)(1) of the Mine Act. Greenwich specified three grounds upon which it believ summary decision was appropriate:

> (1) The orders were not issued as a result of, and the alleged violtions were not detected during, an inspection, as required by section 104(d)(1); on the contrary, MSHA concluded that the alleged violations had occurred based on an investigation after the alleged violations no longer existed;
>
> (2) the orders were not issued within 90 days of the issuance of the section 104(d)(1) citation upon which they were based; and
>
> (3) the orders were not issued "forthwith" as required by the Mine Act.

Greenwich's Motion for Summary Decision at 2.

The administrative law judge granted Greenwich's motion on the firs round, finding it "dispositive." 8 FMSHRC at 1107. Therefore, he did each Greenwich's other arguments in support of its request for summary decision.

I agree with the majority that the judge's decision granting summar decision must be reversed and the case remanded for further proceedings. rite separately to explain the basis for my conclusion in the context o articular circumstances of this case.

In ruling on motions for summary decision the facts must be viewed he light most favorable to the opposing party, here, the Secretary. Un tates v. Diebold, Inc., 369 U.S. 654 (1962). See 6 Moore's Federal Pra 56.15[8](1985). In any event, the essential facts are undisputed and c ummarized as follows. On February 16, 1984, three miners were killed a everal others were injured as a result of an explosion at the Greenwich o. 1 Mine. This incident triggered MSHA's exercise of most of the vari tatutory responsibilities assigned to it under the Mine Act. MSHA part ated in rescue and recovery efforts, conducted inspections of the mine, nvestigated the cause of the explosion, issued numerous citations and o lleging violations of the Mine Act and issued a final report setting fo ts findings and conclusions concerning the explosion.

The particular action taken by MSHA that is challenged by the opera he present case is the issuance of five orders pursuant to section 104(f the Mine Act. Each of these orders allege a violation of a mandatory

The challenge to the procedural validity of these orders by the judge to be dispositive in part concerns whether, as a the Secretary properly can cite under section 104(d) of the Mi tions of the Act that occurred, but which were no longer in ex time of an MSHA inspection so as to be observable by an inspec this aspect of the question of law before us, I agree with the simply because a violation occurs out of the sight of an MSHA the violative condition no longer exists at the time the inspe at the mine, the Secretary is not precluded from charging the a citation or order issued pursuant to section 104(d). For th stated in my concurring opinions in Nacco Mining Co., White Co Corp., and Emerald Mines Corp., all issued this date, the Secr authority to proceed under section 104(d) in such circumstance sistent with the plain language of section 104(d). Furthermor emphasized in Nacco, White County and Emerald, depending on th circumstances involved, the citation of unobserved violations section 104(d) can serve to accomplish that section's intended without damaging its underlying enforcement logic and without impractical implementation problems.

Greenwich's challenge to the orders at issue includes the tion that the Secretary properly cannot proceed under section determination that a violation of the Mine Act occurred result MSHA "investigation", rather than an MSHA "inspection." This was raised by the operators in Nacco, White County and Emerald explained in my concurring opinions in those cases, however, c of their argument was unnecessary because each of those cases enforcement activity under section 104(d) that was, in fact, u "upon an inspection." 30 U.S.C. § 814(d)(1). The factual cir surrounding MSHA's enforcement action in the present case are different from those in the other three cases and serve to bet consideration of the "inspection/investigation" issue. 1/

Section 104(d)(1) of the Mine Act provides that the enfor specified therein can be undertaken by the Secretary "upon any of a coal or other mine." 30 U.S.C. § 814(d)(1)(emphasis adde argues, and the judge agreed, that because the word "inspectio "investigation" are both used in the Mine Act in referring to responsibilities of the Secretary, a distinctive impact on the Secretary's activities was intended depending on the particula

1/ Even in this case the Secretary suggests that considerati issue may be inappropriate because, he asserts, the violative actually were observed by MSHA inspectors conducting post-acci inspections. Oral Arg. Tr. at 3-4; Sec. Br. at 11-12. It is however, that the Secretary's issuance of the orders some thir one-half months after the explosion was, in large part, based

2A Sutherland Statutory Construction, §§ 47.01, 47.28 (4th ed. 1984). Webster's Third New International Dictionary (1971) common definitions o the words are provided which suggest that there are shades of distincti in their meanings, but which also suggest that the meanings of the two v overlap to a certain extent and are not mutually exclusive. 2/ As is st in the majority opinion in Nacco, in common usage "[b]oth words can enco an examination of present and past events and of existing and expired co tions and circumstances." Nacco, supra, slip op. at 8.

The question therefore becomes whether the distinctions or the simi ties in the meanings of the words are to be given emphasis in the conte section 104(d). If the distinctions in meanings are emphasized, then th operator is correct and the Secretary is not authorized to issue citati or orders pursuant to section 104(d) if his determination that a violat occurred is based on information derived from an investigation. Conver if the similarities in the meanings of the words are given emphasis, the violations determined to exist as a result of MSHA investigations prope may be cited under section 104(d).

For the reasons stated below, I agree with the majority's discussi and conclusion in Nacco (slip op. at 7-9) that, in the particular conte of section 104(d), the presence of the word "inspection" and the absenc of the word "investigation" in referring to the Secretary's enforcement activities authorized therein was not intended to have the substantive effect on the Secretary's authority argued for by the operator.

The distinguishing feature of section 104(d) is its authorization Secretary to make a special finding that a violation was caused by an

2/ E.g., "inspection: a strict or close examination; ... an examination or survey of a community, or premises, or an installation by an authorized person (as to determine compliance with regulations or susceptibility to fire or other hazards."

"investigation: detailed examination: study, research; a searching inquiry, an official probe."

Webster's, supra, at 1170, 1189.

"unwarrantable failure" of the operator to comply with the Act or a mandatory standard. The particular importance of an unwarrantable failure findi stems from the probationary effect triggered by its presence in a citation or order. Once a citation containing an unwarrantable failure finding and a significant and substantial finding has been issued, any further violati also caused by an unwarrantable failure within 90 days requires issuance o a withdrawal order, as do still further violations until a complete, clean inspection of the mine has taken place. UMWA v. FMSHRC & Kitt Energy Corp. 768 F.2d 1477, 1479 (D.C. Cir. 1984). Thus, the plain focus of section 104(d)'s enforcement scheme is on the conduct of a mine operator in relati to the occurrence of a violation. If a violation results from an operator unwarrantable failure, "the statute requires that a higher toll be exacted from the operator than is exacted in situations where, although a violatio has occurred, the operator has not acted unwarrantably." Nacco, slip op. at 18 (concurring opinion).

Section 104(d) is one of "the Secretary's most powerful instruments f enforcing mine safety" (Kitt Energy, supra, 768 F.2d at 1479), and the construction of unnecessary impediments hindering the Secretary's ability to fully exercise this special authority should not be undertaken lightly. As described above the focus of section 104(d) is on the conduct of an operator in connection with a violation. In this regard it must be emphasized that the nature of an operator's conduct in relation to a particular violation will not change depending on whether MSHA discovered the fact of violation through an inspection or through an investigation. Acceptance o the operator's argument in the context of section 104(d) would mean that the enforcement procedure established by Congress to specifically address and deter unwarrantable conduct on the part of mine operators could not be invoked in a large number of instances simply because the operator's unwarrantable violation was discovered during an MSHA "investigation" rather than during an MSHA "inspection."

Given the remedial purpose of the Mine Act, the deterrent purpose of section 104(d) in particular, the lack of special definitions of "inspecti and "investigation" in the Mine Act, the substantial overlap in the common understand meanings of the words and the lack of any overriding contrary indication in the legislative history as discussed by the majority and dissenting opinions in this decision and the other decisions issued this date I conclude that the Secretary properly can proceed under section 104(d) of the Mine Act in issuing citations and orders for violations that MSHA determines, during the course of an investigation, to have occurred at a mine. Therefore, I concur in the majority's reversal of the judge's contrary conclusion and in the remand for further appropriate proceedings.

I note that the further proceedings in this case necessarily will encompass consideration of the operator's remaining challenges to the validity of the section 104(d) orders at issue which were not reached by

James A. Lastowka
Commissioner

3/ I believe that the majority's expression of opinion concerning the Secretary's policy of issuing withdrawal orders that have no idling eff is premature. Slip op. at 5-6. In my view, that aspect of this case r full consideration in conjunction with the disposition of the important issues remaining in this case.

able failure sanctions for past completed violations unobserved by inspector apply equally to citations and orders issued under sectio 30 U.S.C. 814(d).

Furthermore, as noted in my Nacco dissent, supra, at pp. 33-36 majority's decision places no temporal restrictions on the imposition section 104(d) sanctions. The majority suggests that a procedural may lie where section 104(d) orders are issued 13 months after the of an underlying 104(d)(1) citation. However, the surer remedy aga gross distortions of the unwarrantable failure "chain" would be to the application of section 104(d) to extant violations observed by tors in the course of their inspections. I firmly contend that the so provides.

Unlike my colleagues, I am not persuaded that a closure order closes no mine or part thereof - or that withdraws no miners - serv Secretary's enforcement policy. As noted in my Nacco dissent at p. such an enforcement action is a dead letter, or as Greenwich conten "sham." Brief at p. 13.

Accordingly, I dissent.

Ford. B. Ford
Chairman

icki Shteir-Dunn, Esq.
ffice of the Solicitor
.S. Department of Labor
015 Wilson Blvd.
rlington, Virginia 22203

ary Lu Jordan, Esq.
nited Mine Workers of America
00 15th St., N.W.
ashington, D.C. 20005

nomas W. Meyers, Esq.
nited Mine Workers of America
6000 Dilles Botton
nadyside, Ohio 43947

imothy M. Biddle, Esq.
nomas C. Means, Esq.
aul W. Reidl, Esq.
rowell & Moring
001 Pennsylvania Ave., N.W.
ashington, D.C. 20004

. Henry Moore, Esq.
ose, Schmidt, Chapman, Duff & Hasley
00 Oliver Bldg.
ittsburgh, Pennsylvania 15222

dministrative Law Judge Roy J. Maurer
ederal Mine Safety & Health Review Commission
203 Leesburg Pike, Suite 1000
alls Church, Virginia 22041

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 30, 1987

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

QUINLAND COALS, INC.

Docket No. WEVA 85-169

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)(the "Mine Act"), and presents three issues: (1) whether substantial evidence supports Commission Administrative Law Judge William Fauver's findings of violations of 30 C.F.R. § 75.200 and 30 C.F.R. § 75.303, and his finding of negligence with respect to the violation of section 75.200 ; (2) whether an allegation by the Secretary of Labor ("Secretary") that a violation was caused by an operator's unwarrantable failure to comply with a cited standard can be contested in a civil penalty proceeding, where the order itself was not contested pursuant to section 105(d); and (3) whether the judge erred in considering certain exhibits. For the reasons that follow, we affirm the judge's findings of violation and negligence, hold that the judge erred in failing to rule on the merits of the unwarrantable failure allegation, and conclude that the judge's consideration of the exhibits was not improper.

I.

The No. 1 Mine operated by Quinland Coals, Inc. ("Quinland") is an underground coal mine located in southern West Virginia. On October 11, 1984, Ernest Thompson, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted an inspection of the mine in order to inspect seals located in the mine's East Mains area. 1/ The alleged violations concern the roof conditions in the

---

1/ The seals ...

entry in which the No. 7 seal is located.

The entry was accessible from a crosscut. In the entry and ne its intersection with that crosscut, the inspector observed a large fall and as he walked toward the seal, he observed approximately ten broken posts lying on the ground in the entry. The inspector also observed that one side of the seal was being crushed by the weight o the roof. He noted that the roof was cracked and that the cracks ra from the roof fall to and beyond the seal. The inspector testified he heard hissing through the cracks and that his methane detector registered an atmosphere of more than 5% methane in the immediate vicinity of the seal.

The inspector found that these conditions constituted a violat of 30 C.F.R. § 75.200 in that the roof was not adequately supported protect persons from falls. 2/ The inspector also found that this violation was the result of Quinland's unwarrantable failure to comp with section 75.200 and that the violation significantly and substan tially contributed to a mine safety hazard. 30 U.S.C. § 814(d)(1). Because a citation had been issued to Quinland pursuant to section 104(d)(1) of the Mine Act, within 90 days prior to the October 11, 1 inspection, the inspector cited the violation of section 75.200 in a order issued pursuant to section 104(d)(1). Id. 3/ Quinland abated

---

Tr. 21. See also Bureau of Mines, U.S. Department of Interior, A Di tionary of Mining, Mineral, and Related Terms 975 (1968).

2/ Section 75.200, which restates section 302(a) of the Mine Act, U.S.C. § 862(a), provides in part:

> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form....

(Emphasis added.)

3/ Section 104(d)(1) of the Mine Act states:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds

Following the underground portion of the inspection, the inspe returned to the surface and went to the mine office where he reviewe that portion of the preshift examination record book relating to the 7 seal area. The inspector observed the word "clear" written in the book to describe the condition of the No. 7 seal area as found by th preshift examiner on October 11, 1984. The inspector found that the failure to record the condition of the roof and the presence of the methane indicated that the preshift examination on October 11 was inadequate and that it constituted a violation of 30 C.F.R. §75.303.

> contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this [Act]. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

4/ Section 75.303, which restates section 303(d)(1) of the Mine A 30 U.S.C. §863(d)(1), provides in part:

> (a) Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section in such workings and shall make tests in each such working section for accumulations of methane with means approved by the Secretary for detecting methane, and shall ... examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions

Quinland did not contest the section 104(d)(1) orders within 30 days of their receipt. 30 U.S.C. §815(d). In March 1985, however, wh the Secretary proposed civil penalties for the violations, Quinland requested a hearing. 30 U.S.C. §815(a). In answer to the Secretary's civil penalty assessment petition, Quinland denied that it violated th cited mandatory safety standards. In addition, Quinland asserted that "should a violation [of section 75.200] be found to exist ... the unwarrantable feature of the violation is improper."

Following an evidentiary hearing, the administrative law judge concluded that Quinland violated both sections 75.200 and 75.303. 8 FMSHRC 1175 (August 1986)(ALJ). The judge credited the testimony of the inspector and found that the condition of the roof was inadequate protect persons from roof falls. 8 FMSHRC at 1178. Regarding the preshift examination, the judge found that the hazardous condition of the roof should have been reported by the preshift examiner on October 11, 1984, and that the failure to do so was a violation of section 75.303. 8 FMSHRC 1178-79. The judge held, however, that the failure of the preshift examiner to note the presence of methane did violate the standard because the Secretary did not prove that methane was present at the time of the preshift examination. 8 FMSHRC at 117

The judge found that both violations were of a significant and substantial nature, but made no finding as to whether the violation o section 75.200 was due to Quinland's unwarrantable failure to comply with the standard. The judge assessed civil penalties of $850 for th violation of section 75.200 and $450 for the violation of section 75.303. We granted Quinland's petition for discretionary review.

II.

Section 75.200 requires that roof and ribs "be supported or otherwise controlled adequately." Liability for an alleged violation this standard is resolved by reference to whether a reasonably pruden person, familiar with the mining industry and the protective purpose the standard, would have recognized that the roof or ribs were not adequately supported or otherwise controlled. Specifically, the

---

> or safety standards, as an authorized representative of the Secretary may from time to time require.... Upon completing his examination, such miner examiner shall report the results of his examination to a person, designated by the operator to receive such reports... before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination with ink or indelible pencil in a book approved by the Secretary....

reasonably prudent person, familiar with the mining [illegible] protective purpose of the standard, would have provided in order the protection intended by the standard. Canon Coal Co., 9 FMSH 668 (April 1987). Cf. Ozark-Mahoney Co., 8 FMSHRC 190, 191-92 (F 1986); Great Western Electric Co., 5 FMSHRC 840, 841-42 (May 1983 Steel Corp., 5 FMSHRC 3, 5 (January 1983); Alabama By-Products Co 4 FMSHRC 2128, 2129 (December 1982). Measured against this test, conclude that substantial evidence supports the judge's conclusio the roof support in the area of the No. 7 seal was inadequate. 5/

In holding that Quinland violated section 75.200, the judge credited the testimony of the inspector that the roof support in 7 seal entry was inadequate to protect persons from roof falls. 8 FMSHRC at 1178. The inspector's testimony regarding the condit the roof was detailed and essentially uncontradicted. The inspec described the roof fall, the broken posts, the damage to the No. caused by the weight of the roof, and the cracks in the roof. Th inspector stated that the roof had "dropped down approximately an ... [and] ... was leaning on what supports they had in there and seal." Tr. 26. The inspector believed that the weight on the ro caused the posts to break. Dust on some of the broken posts indi to the inspector that the posts had been broken for perhaps a mon two and that the deterioration of the roof was progressive.

We have recognized that a "judge's credibility findings ... not be overturned lightly." Robinette v. United Castle Coal Co., 3 FMSHRC 803, 813 (April 1981). Accord, Bjes v. Consolidation Co 6 FMSHRC 1411, 1418 (June 1984). Quinland's witnesses did not di the condition of the roof as described by the inspector. Indeed, confirmed generally what the inspector had seen. The mine forema stated that the area in which the seals were located had "bad to places. Tr. 124. Quinland's preshift examiner acknowledged that broken posts had not been replaced. Tr. 200. Both agreed that s posts had been broken for a month or more.

Thus, in view of the inspector's detailed testimony describ conditions in the area of the No. 7 seal, the mine foreman's acknowledgement that the roof was bad generally and the pre-shift examiner's acknowledgement that some broken posts had not been re we conclude that substantial evidence supports the judge's findin violation of section 75.200. Further, given this evidence establ that the violation of section 75.200 was visually obvious and had existed for a protracted time, we find that substantial evidence supports the judge's conclusion that Quinland was negligent in al the violation of section 75.200 to exist.

5/ Quinland's assertion that the Secretary is estopped from al a violation of section 75.200 because MSHA inspectors had found previously that the roof in the area of the No. 7 seal was adequa

violated the standard.

III.

The inspector found that the violation of section 75.200, as in the section 104(d)(1) order, was the result of Quinland's unwarr table failure to comply with the mandatory standard. As noted, Qui did not contest the validity of the order pursuant to section 105(d the Mine Act. 6/ Instead, in contesting the Secretary's penalty proposal pursuant to section 105(a) of the Act, Quinland contended specifically that the unwarrantable failure finding was improper. 7

6/ Section 105(d) states in part:

> If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 814 of this [Act], or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 814 of this [Act], or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 814 of this [Act], or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 814 of this [Act], the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief....

30 U.S.C. § 815(d).

7/ Section 105(a) states in part:

> If, after an inspection or investigation, the Secretary issues a citation or order under section

proper subject for review in a penalty proceeding.

The contest provisions of section 105 are an interrelated whole. We have consistently construed section 105 to encourage substantive review rather than to foreclose it. See, e.g., Energy Fuels Corp., 1 FMSHRC 299, 309 (May 1979). The statutory scheme for review set fort in section 105 provides for an operator's contest of citations, orders, and proposed assessment of civil penalties. Generally, it affords the operator two avenues of review. Not only may the operator immediately contest a citation or order within 30 days of receipt thereof, 30 U.S.C §815(d), but he also may initiate a contest following the Secretary's subsequent proposed assessment of a civil penalty within 30 days of the Secretary's notification of the penalty proposal. 30 U.S.C. §

> [104] of this [Act], he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section [110(a)] of this [Act] for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. A copy of such notification shall be sent by mail to the representative of miners in such mine. If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency....

30 U.S.C. § 815(a).

8/ Several unreviewed decisions of various Commission administrative law judges reflect disagreement on this issue. Two decisions hold that the merits of an unwarrantable failure finding may be reviewed in a civil penalty proceeding. C. F. & I. Steel Corp., 4 FMSHRC 1776, 1786, (September 1982) (ALJ Carlson); Price River Coal Co., 3 FMSHRC 1766, 1771-73 (October 1983) (ALJ Vail). Three decisions reach the opposite conclusion. Turner Brothers, Inc., 6 FMSHRC 2125, 2130 (September 1980 (ALJ Koutras); Clinchfield Coal Co., 2 FMSHRC 290, 292 (February 1980) (ALJ Moore); Windsor Power House Coal Co., 6 FMSHRC 1739, 1740-41 (July 1980) (ALJ Melick).

arguments we have afforded a wide latitude for review and eschewed preclusion. For example, in Energy Fuels, supra, we rejected the Secretary's argument that review of a violation and special findings contained in an abated citation is available only in a civil penalty proceeding. We found that the language of the Act did not so limit review and that the purposes of the Act and the interests of those subject to it are best served by permitting an immediate contest. 1 FMSHRC at 309. 10/ Here, the Secretary argues that failure to seek immediate contest of the order containing the alleged violation bars operator from challenging the validity of special findings in a subsequent civil penalty proceeding. We reject once again a restric interpretation of section 105. Because under the Mine Act a special finding is a critical consideration in evaluating the nature of the violation alleged and bears upon the appropriate penalty to be asses we conclude that the Act does not preclude the review of special findings in a civil penalty proceeding and that the purpose of the A and the interests of those subject to it are best served by permitti review.

There is no dispute that the fact of violation may be placed i issue by the operator in a civil penalty proceeding regardless of whether the operator has availed itself of the opportunity to contes the citation or order in which the allegation of violation is contai The Commission also has held that the procedural propriety of the issuance of a withdrawal order does not affect the allegation of a violation contained in the order. Island Creek Coal Co., 2 FMSHRC 2 280 (February 1980); Van Mulvehill Coal Co., 2 FMSHRC 283, 284 (Febr

---

9/ The procedures followed by the Secretary in proposing penaltie for violations usually result in an operator's receipt of the Secretary's notice of proposed penalty at a time substantially after expiration of the 30-day period within which the operator may contes citation or order.

10/ The special findings of "unwarrantable failure" and "significa and substantial" are found in sections 104(d) and 104(e) of the Act. U.S.C. §§814(d), 814(e). Under section 104(d), an inspector's findi that a violation is the result of "unwarrantable failure" to comply a mandatory standard and is "significant and substantial" leads to t issuance of a section 104(d) citation, and subsequent findings of unwarrantable failure may lead to a "chain" of withdrawal orders unt an inspection of the mine discloses no further violations based on unwarrantable failure. 30 U.S.C. §§814(d)(1) & (2). Under section 104(e) where an operator has been given written notice by the Secret that a pattern of "significant and substantial" violations exists, further significant and substantial violations may lead to a similar "chain" of withdrawal orders. 30 U.S.C. §814(e).

Inc., 3 FMSHRC 1895, 1896-98 (August 1981); See also Co-op Mining Co., 2 FMSHRC 3475, 3475-76 (December 1980). Similarly, since the alleged violation survives, findings incidental to the violation survive as well.

It is apparent from the language of section 104(d) that special findings are made incident to the finding of violation. In addition to the finding of violation, the inspector must find that "such violation" is of a significant and substantial nature and that "such violation" is caused by the operator's unwarrantable failure to comply with the cited standard. 30 U.S.C. §814(d)(1) (emphasis added). As the Commission has held, these findings fully describe the nature and the characteristics of the violation. Consolidation Coal Co., 6 FMSHRC 189, 192 (February 1984).

The allegation of a violation contained in a citation or order is an initial step in the enforcement of the Mine Act and of its mandatory health and safety standards. The civil penalty assessed for the violation must reflect the surrounding facts and correlate with the nature of the violation through application of the statutory penalty criteria. 30 U.S.C. §820(i). Accordingly, in assessing a penalty, consideration of all incidents of a violation, including the special findings, is appropriate. The Commission has stated:

> The validity of the allegation of violation and of any special findings made in connection with the alleged violation, all bear upon the appropriate penalty to be proposed by the Secretary prior to adjudication and to be assessed by the Commission if a violation is ultimately found....

Old Ben Coal Co., 7 FMSHRC 205, 207-08 (February 1985)(emphasis added).

In previous cases where the Secretary has charged an operator with a violation in a citation issued pursuant to section 104(a) of the Mine Act, 30 U.S.C. §814(a), and has made special findings in the citation, the validity of the special finding at issue has been addressed in the penalty proceedings albeit without specific discussion of the issue addressed here. Cement Division, National Gypsum Company, 3 FMSHRC 822 (April 1981). See also Consolidation Coal Co., supra, 6 FMSHRC at 191-192. The Commission also has recognized that the statutory penalty criterion of negligence and the special finding of unwarrantable failure, although not identical, are based frequently upon the same or similar factual circumstances. Black Diamond Coal Co, 7 FMSHRC 1117, 1122 (August 1985). 11/ In addition, the Secretary's regulatory procedures governing his proposed assessment of civil penalties reflect

---

11/ In like manner, the "gravity" penalty criteria and a special finding of "significant and substantial" although not identical, are

may elect to waive the regular assessment formula (§ 100.3) in the single assessment provision (§100.4) if the agency determines that conditions surrounding the violation warrant special assessment." The regulation further provides that "[a]ccordingly, the following categories [of violations] will be reviewed individually to determine whether a special assessment is appropriate:... (b) Unwarrantable failure to comply with mandatory health and safety standards...." 30 C.F.R. §100.5(b). Because of the interdependent nature of special findings and the penalty assessment provisions of the Mine Act, it is appropriate to allow contest of such findings in a civil penalty proceeding and not to preclude this challenge because the operator failed to contest the validity of the order in which the findings are contained within 30 days of its issuance.

Most mine operators who immediately challenge a citation or order containing a special finding are concerned with the withdrawal consequences of an order or its "chain" implications. Conversely, those that elect to forego the immediate contest of an order that includes special findings will not be concerned primarily with such consequences. We expect that by delaying contest of an order and the special findings contained therein until the civil penalty proceeding is instituted, an operator's concern will be the deletion of the special findings and a reduction of the civil penalty. Indeed, this is the relief requested in the present case. We recognize that if a special finding is vacated by a judge, in some instances it may be appropriate for the judge to order modification or vacation of the order in which the special finding is contained. Such a circumstance most likely would arise when such modification or vacation would bear upon pending litigation involving a "chain" of which the order was a part. See generally Consolidation Coal Co., 4 FMSHRC 1791, 1793-95 (October 1982). This case does not require discussion of all conceivable collateral effects that might arise from the vacation or modification of an order containing special findings. Resolution of such questions can await cases in which they are specifically presented. 12/ Whatever the collateral effects may be, they arise from the right to review provided to operators by section 10 of the Act.

We therefore conclude that the judge erred in failing to consider Quinland's challenge to the unwarrantable failure finding associated with the violation of section 75.200.

12/ We note that the Secretary has the power to propose more quickly

evaluate the veracity of Quinland's preshift examiner with respect to the frequency of his reports of hazardous conditions. The information was relevant and material to the issue of credibility. In submitting copies of the reports themselves, the Secretary's counsel failed to follow literally the procedure ordered by the judge. However, acceptance of the copies did not prejudice Quinland because they confirmed the examiner's statement that he frequently noted hazardous conditions during his preshift examinations. Tr. 205-06. Furthermore, the judge did not rely on the reports in concluding that Quinland violated section 75.303. Consequently, even if acceptance of the reports was erroneous, the error was harmless.

For the foregoing reasons, we hold that substantial evidence supports the findings of the judge that Quinland violated section 7 and section 75.303 and that the violation of section 75.200 was the result of Quinland's negligence. We further hold that the judge er in failing to address whether the violation of section 75.200 was t result of Quinland's unwarrantable failure. Finally, we hold that operator was not prejudiced by the judge's acceptance of copies of preshift examination reports. Accordingly, the contested findings violation and negligence are affirmed, as is the civil penalty assessment for the violation of section 75.303. The matter is rema to the judge to determine whether the violation of section 75.200 w the result of Quinland's unwarrantable failure to comply with that mandatory safety standard and for such further proceedings as are t appropriate.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

U.S. Department
4015 Wilson Blvd.
Arlington, VA 22203

Robert D. Cline, Jr., Esq.
Shaffer & Shaffer
330 State Street
Madison, West Virginia 25130

William Stover, Esq.
41 Eagles Road
Beckley, West Virginia 25801

Administrative Law Judge William Fauver
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

September 30, 1987

ODELL MAGGARD	:	
	:	
v.	:	Docket No. KENT 86-1-D
	:	
CHANEY CREEK COAL CORPORATION	:	
	:	
and	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of ODELL MAGGARD	:	
	:	
v.	:	Docket No. KENT 86-51-D
	:	
DOLLAR BRANCH COAL CORPORATION and CHANEY CREEK COAL COMPANY	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

On August 25, 1987, the Commission issued its decision in thi matter. On September 15, 1987, the Commission received from counse respondents a Motion for Reconsideration and a Motion to Amend Peti for Discretionary Review. Oppositions to both motions have been received from complainant Odell Maggard and from the Secretary of L The operators request the Commission to reconsider its denial of th prior motion seeking dismissal of Dollar Branch Coal Corporation ("Dollar Branch") as a party on the asserted grounds that Dollar Br had no direct employment relationship with Maggard. Upon considera of the motions and the oppositions, the motions are denied.

We previously ruled that we were barred as a matter of law by Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), from considering this issue because it was not included in operators' petition for discretionary review. Odell Maggard v. Cha Creek Coal Corporation, etc., 9 FMSHRC ___, Nos. KENT 86-1, etc., s op. at 2 n. 2 (August 25, 1987). We adhere to that ruling. We not

and acted upon in a timely manner.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Office of the Solicitor
U.S. Department of Labor
2015 Wilson Blvd.
Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 19, 1986

GARRY GOFF	:	
	:	
v.	:	Docket No. LAKE 84-86-D
	:	
YOUGHIOGHENY & OHIO COAL COMPANY	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This proceeding concerns a discrimination complaint filed by Garry Goff pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)(the "Act"). Following a previous determination by the Commission that Goff's complaint stated a cause of action under section 105(c)(1) of the Act, the matter was remanded to Commission Administrative Law Judge Melick. The purpose of the remand was to determine whether Goff was discriminatorily discharged b the Youghiogheny and Ohio Coal Company ("Y&O") because he was "the sub of medical evaluation and potential transfer" under the standards set forth in 30 C.F.R. Part 90. 1/ 7 FMSHRC 1776 (November 1985). On rem the judge examined that issue and found that Goff was not discharged i violation of section 105(c)(1). 2/ 8 FMSHRC 741 (May 1986)(ALJ). Th Commission granted Goff's petition for discretionary review. For the reasons that follow, we affirm.

1/ Under 30 C.F.R. Part 90, a miner determined by the Secretary of Health and Human Services to have evidence of the development of pneum coniosis is given the opportunity to work without loss of pay in an ar of the mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligrams per cubic meter of air ("mg/m^3").

2/ Section 105(c)(1) of the Act provides in part as follows:

law judge concluded that Goff's complaint was based on an allega
that Goff was discriminated against because he suffers from Blac
(pneumoconiosis) and that such a complaint could be resolved onl
section 428 of the Black Lung Benefits Act, 30 U.S.C. § 901 et s
(1982)("BLBA"). Therefore, the judge granted the motion to dism
6 FMSHRC 2055 (August 1984). On review, we reversed the judge's
holding that a miner may state a cause of action under section 1
of the Mine Act by alleging discrimination based upon the miner
"the subject of medical evaluations and potential transfer" under
90 and remanded the proceeding to the judge to determine whether
had been discharged unlawfully.

Our task on review is to determine whether the judge properl
concluded that Goff was not discriminatorily discharged in violat
section 105(c)(1) of the Act. A number of collateral issues were
by the complainant which lie outside the scope of our review and
we do not address; for example, whether Goff in fact had pneumoco
which of the various doctors seen by Goff correctly diagnosed his
condition, and whether Y&O's leave policies were reasonable. Furt
our review in no way addresses any separate remedy Goff may be see
under section 428 of the BLBA. 30 U.S.C. § 938. 3/

I.

Goff worked as a supervisory foreman for Y&O from September 1
until January 20, 1984. In August 1982, while employed at Y&O's Al
Mine, Goff's doctor diagnosed him as having pneumoconiosis and Goff
thereafter was assigned to work primarily outside the mine. In Oct
1983, Goff again was diagnosed by his doctor as having pneumoconios

3/ The BLBA is administered by the Employment Standards Administr
("ESA") of the Department of Labor. The Department of Labor is cha
with the duty under both the Mine Act and the BLBA to investigate p
coniosis-related discrimination complaints. Accordingly, the Depar
MSHA and its ESA have entered into a Memorandum of Understanding ("
to coordinate their investigations and to clarify their jurisdictio
procedures. 44 Fed. Reg. 75952 (Dec. 21, 1979).

Under the MOU, ESA makes the determination as to whether a viol
of section 428 of the BLBA has occurred and MSHA makes a determinat
whether a violation of section 105(c) of the Mine Act has occurred.
the aggrieved person proceeds with complaints under both sections, M
proceeds first with the section 105(c) complaint and ESA may then pr
with the section 428 complaint. The MOU reflects that the two secti
may provide different remedies.

Goff went to his doctor and was diagnosed as having bronchitis and advised not to return to work for two weeks or until he recovered. After Goff relayed this advice to Ronevich, he was requested by Y&O to undergo a medical examination at the Wheeling Park Hospital. The next day Goff reported for that examination. He was given a battery of medical tests, had chest x-rays taken, and was examined by a certified "B" reader of chest x-rays. 4/ The results of his examination were not immediately available. 5/

On January 14, 1984, the day after his medical examination at the Wheeling Park Hospital, Goff mailed a Part 90 application and chest x-rays to MSHA. These x-rays had been taken at a local clinic in Octo 1983. Goff's application requested a determination by MSHA of his eligibility for participation in the Part 90 transfer program.

On January 16, 1984, Goff wrote a letter to Donald Weber, Y&O's director of personnel, calling attention to his chest x-rays of August 1982 and October 1983 and stating that he was unable to perform his duties as a labor foreman due to pneumoconiosis and that he should not be working underground in the dust. Goff further stated that until he had a job out of the dust, he would be off work under doctor's advice, but was willing to return to work with his doctor's release. The lett made no reference to Part 90 status. On January 19, 1984, Goff met wi Weber and Wurschum and was advised that review of the medical report from Wheeling Park Hospital indicated that there was nothing preventin Goff from working underground as a supervisor, and that if he did not

4/ A "B" reader is a person possessing the highest qualifications to read chest x-rays for evidence of pneumoconiosis by the National Insti of Occupational Safety and Health.

5/ Goff states that while awaiting his examination, he was asked by nurse whether he wanted to complete a Part 90 application and have the application and his x-rays sent to MSHA for a Part 90 status determina Goff states that he completed the application but that the application and the Wheeling Park Hospital x-rays were not sent to MSHA. Tr. 196-97, 200. On review, Goff alleges that Y&O prevented the mailing o the application and the x-rays. There is, however, no evidence in the record which supports even an inference to support this allegation.

return to work the next day, he would be discharged. 6/ Goff testifi that he told Weber and Wurschum that he would be unable to work until his doctor authorized his return. Goff did not report to work on Jan 1984. On January 21, he received a letter from Y&O dated the previous day informing him that he was discharged for failing to report to work The letter stated that Goff's "allegation of not being able to work ha not been documented by medical certification" and noted that the resul of Goff's medical examination on January 13 did not indicate any reaso that would prevent Goff from working underground. On January 30, 1984 Goff took a medical release dated January 24, 1984, to Weber, who indi that Y&O was not hiring.

On July 2, 1984, Goff received a letter from MSHA stating that based on the chest x-ray reports he had sent to MSHA on January 14, pneumoconiosis was indicated and he was eligible under Part 90 to work in an area of the mine with an average concentration of respirable dust at or below 1.0 mg/m^3 of air. On August 8, 1984, however, Goff was fur advised by MSHA that because he no longer was employed at an undergroun coal mine, Part 90 status was not applicable to him.

II.

In concluding that Y&O did not discharge Goff unlawfully, the judg noted that for Goff to establish a violation of section 105(c)(1), Goff had to prove that he engaged in protected activity and that his discharg was motivated in any part by the protected activity. 8 FMSHRC at 743. (Citing to Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2799 (October 1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981).) With respect to the motivational issue, the judge indicated that there was no evidence that any Y&O personnel knew, prior to Goff's discharge, that he had filed a Part 90 application. 8 FMSHRC at 743-44. In additi the judge concluded that Y&O officials could reasonably have given greater weight to the medical evidence they obtained from the Wheeling Park Hospital medical evaluation of Goff, which indicated that Goff did not have pneumoconiosis and was capable of working. 8 FMSHRC at 744.

6/ Dr. Elliott stated in his medical report:

> Chest x-ray was within normal limits. No evidence of pneumoconiosis was seen.
>
> There was no evidence of any significant respiratory or pulmonary disease physiologically.
>
> I find no medical reason at this time that would prevent Mr. Goff from being able to

him on that basis because Part 90 status would not have affected Goff's work assignment as a labor foreman. 8 FMSHRC at 744. Under Part 90, a qualifying miner is entitled only to transfer to a dust reduced area w concentrations of respirable dust are at or below 1.0 mg/m^3 of air, and the judge noted that Wurschum believed the dust concentrations in the entire Nelms Mine were less than 1.0 mg/m^3 of air. The judge furt noted that in 1984 the average respirable dust concentration in the outby areas of the mine, where Goff ordinarily would have worked, was 0.55 mg/m^3 of air and that even near the face the average concentratio was less than 1.0 mg/m^3 of air. 8 FMSHRC at 244. The judge concluded that Goff had "failed in his burden of proving that Y&O was motivated any part in discharging him because he was 'the subject of medical evaluation and potential transfer' under Part 90." 8 FMSHRC at 745.

III.

For the reasons that follow, we affirm the judge's conclusion tha Goff's discharge did not violate the Act. A complaining miner establi a prima facie case of prohibited discrimination under the Mine Act by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Pasu 2 FMSHRC at 2797-2800; Secretary on behalf of Robinette v. United Cast Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut t prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n. 20. See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983)(specifically approving th Commission's Pasula-Robinette test).

The medical examinations and procedures to which Goff was subject in this case were intended to determine whether he suffered from pneum coniosis, an initial step in obtaining Part 90 status, and as such, we protected activities. Further, Goff engaged in protected activity in applying to MSHA for a determination of his eligibility for Part 90 status. Like the medical evaluations, the application process is a necessary preliminary step and comes within the statutory protection afforded miners who are the "subject of medical evaluations and potent transfer" under Part 90.

We conclude, however, that although these events constituted prot activities, Goff did not establish that Y&O was motivated in any part knowledge of such protected activities.

Direct evidence of actual discriminatory motive is rare. Short o such evidence, illegal motive may be established if the facts support reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub. nom. Donovan v. Phelps Dodge Corp., 709

F.2d 51 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). The present record contains no direct evidence that Y&O was illegally motivated, nor does it support a reasonable inference of discriminatory intent.

In examining the record for instances in which discriminatory intent could be inferred, we note that, with respect to Goff's medical evaluations of August 1982 and October 1983, Y&O did not discharge Goff because of these evaluations. To the contrary, the record indicates that Y&O accommodated Goff by assigning him work primarily on the surface. Not until the Allison Mine closed in early January 1984, approximately a year and a half after Goff's first diagnosis of pneumoconiosis, was he transferred to underground work. 7/

Similarly, no inference of discriminatory intent can be inferred from Y&O's response to Goff's medical evaluation of January 1984. Substantial evidence supports the judge's conclusion that Y&O reasonably relied upon Wheeling Park Hospital's January 1984 evaluation of Goff which, based upon specific medical tests and x-rays, indicated that Goff was fit to return to work.

With respect to Goff's Part 90 application, we affirm the judge's finding that Y&O did not know prior to his discharge that Goff had filed a Part 90 application. There is no evidence that Goff told supervisory personnel at Y&O that he had applied or was going to apply for Part 90 status. Goff states that he told mine manager Wurschum on January 1984, that he wanted to take one or two days off to "get x-rays taken" to settle the situation concerning his pneumoconiosis. Goff Dep. 58, Tr. 188. According to Wurschum, Goff asked only whether he was going to be allowed to take some days off and Goff said nothing about having x-rays taken or applying for Part 90 status. Tr. 401. We note that Goff actually filed his application on January 14, 1984. After that date Goff easily could have notified Y&O personnel that he had filed for Part 90 status (for example: in his January 16, 1984, letter to Weber or at the January 19, 1984, meeting). Goff did not do so. We hold that the record therefore supports the judge's finding that there is no "evidence that any Y&O personnel knew, prior to his discharge, that [Goff] had filed a Part 90 application." 8 FMSHRC at 744.

7/ Goff also argues that Y&O interfered with his section 105(c)(1) rights by failing to report his illness as required by 30 C.F.R. Part 50 when Y&O first became aware that he had been diagnosed with pneumoconiosis. We do not agree. Under Part 50, an operator is required to report illness, including pneumoconiosis, to the appropriate MSHA District Office and to the MSHA analysis center in Denver. 30 C.F.R. §§ 50.20 and 50.20-6. Failure to report as required may be a violation of Part 50, but it does not constitute discrimination. The purpose of reporting a miner's illness [illegible]

than 1.0 mg/m³ of air. That testimony was not disputed. 8/ Neverthe Goff stated in his letter to Weber that on the advice of his doctor, would be off work until he had a dust free job. Neither the Act nor P 90 gives a miner with evidence of the development of pneumoconiosis t right to work in a mining environment that is totally free of respira dust. Rather, section 203(b)(2) of the Act, 30 U.S.C. § 843(b)(2), a 30 C.F.R § 90.3(a) give a miner with evidence of the development of pneumoconiosis the right to exercise an option to transfer to an area the mine with an average respirable dust concentration at or below 1. mg/m³ of air, not to cease work altogether.

There is no proof in this record that Goff would have encountere excessive and impermissible respirable dust concentrations in his und ground assignment. As previously indicated, there is persuasive evid that during 1984 the average concentration of respirable dust in area outby the faces was 0.55 mg/m³ of air and the average concentration i inby areas was less than 1.0 mg/m³ of air.

By refusing to report to work until he was assigned a dust-free job, Goff acted beyond the purview of section 203 of the Act and 30 C.F.R. Part 90. As such, his work refusal was not protected by the statute.

8/ Although the mine manager's testimony was based on the results o respirable dust samples taken pursuant to 30 C.F.R. Part 70, the resu are indicative of the respirable dust concentrations that Goff could expect to encounter. They reflect average concentrations of respirab dust in areas where Goff ordinarily would be expected to work. Tr. 3

We find that Goff did not establish that the protect
being "the subject of medical evaluation and potential tr
way motivated Y&O to discharge him. Rather, Y&O discharg
he refused to report for work as ordered. We therefore a
judge's dismissal of Goff's complaint.

Ford B. Ford, Cha

Richard V. Backley

Joyce A. Doyle, Co

James A. Lastowka,

L. Clair Nelson, C

Distribution

Garry Goff
57920 Rocky Fork Road
Jacobsburg, Ohio 43933

Gerald P. Duff, Esq.
Hanlon, Duff & Paleudis Co., LPA
46770 National Road West
P.O. Box 77
St. Clairsville, Ohio 43950

Administrative Law Judge Gary Melick
Federal Mine Safety and Health Review Commission
5203 Leesburg Pike, Suite

ADMINISTRATIVE LAW JUDGE DECISIONS

INISTRATION (MSHA),	:	Docket No. WEST 85-151-M
BEHALF OF	:	MD 85-11
E A. JONES,	:	
Complainant	:	Dee Gold Mine
	:	
v.	:	
	:	
OLD MINING COMPANY,	:	
Respondent	:	

DECISION

rances: Marshall P. Salzman, Esq., Office of the Solicitor
U.S. Department of Labor, San Francisco, California,
for Complainant;
Jay W. Luther, Esq., Chickering & Gregory, San Francisco, California,
for Respondent.

e: Judge Lasher

This proceeding involves a discrimination complaint brought e Secretary of Labor on behalf of George A. Jones (herein lainant"). The Secretary's complaint, as amended, alleges Complainant was discharged (laid off) for engaging in pro- d safety activities in violation of Section 105(c) of the al Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)).[1/]

The Secretary contends that Complainant Jones, a maintenanc yee in Respondent's ball mill at the time of his discharge erminated because of protected safety activities occurring rily in the last month of his employment. Respondent nds that as a result of a "Feasibility Capital Cost Study" in referred to as the Kilburn Report) a reduction-in-force in RIF and layoff) was called for and planned, and Com- ant, because of inferior work performance ("slow workman , "productivity" and other problems) was one of two

---

he hearing was held during a period of four days, October 2, 23, and 24, 1986. For each day of hearing there is a ate transcript beginning with page one. Accordingly, cript citations will be prefaced with "I", "II", "III", an respectively, in this manner "I-T ___", "II-T. ___", etc.

threshold issue, Respondent contends that there was "a
months beyond the statutory maximum."

A chronology of most pertinent events was the sub
stipulation between the parties (Court Ex. 1; I-T. 42-
thereon and other evidence the following sequence is f
have occurred.

October 11, 1984	Complainant was terminated (I-
October 12, 1984	Complainant filed "an informal with MSHA. Although not criti issue, I find that this filing with the 60 day filing require individual miners contained in 105(c) of the Act, even though plaint is not filed on a parti standard form provided by the of Labor.
November 13, 1984	Complainant filed a "formal co with MSHA on an MSHA form.
December 5, 1984	The Secretary (MSHA) commenced vestigation of the complaint.
April 24, 1985	The Secretary's written determ that a violation occurred was
July 1, 1985	The Secretary's Complaint was cording to the date stamp ther official Commission file folde parties' stipulation that such on or about June 25, 1985, is in view of the more precise in reflected in the file.

It is clear that Complainant Jones was prompt wit
filing of his complaint with the Secretary. Responden
contention is the Secretary's delay. In Secretary v.
Company, Inc., 8 FMSHRC 905 (1986), the Commission del
various obligations of the Secretary in processing dis
complaints:

> "The Mine Act requires the Secretary to proceed w
> expedition in investigating and prosecuting a min
> discrimination complaint. The Secretary is requi
> within the following time frames: (1) The investi
> miner's complaint "shall commence within 15 days"
> of the miner's complaint (30 U.S.C. § 815(c)(2)).

of the miner's complaint (30 U.S.C. § 815(c)(3)); and (3) if the Secretary determines that there has been a violation of the Act, "he shall immediately file a complaint with the Commission." 30 U.S.C. § 815(c)(2). (Emphasis added throughout.) Finally, section 105(c)(3) of the Act specifically states, "Proceedings under this section shall be expedited by the Secretary and the Commission." 30 U.S.C. § 815(c)(3).

While the language of section 105(c) leaves no doubt that Congress intended these directives to be followed by the Secretary, the pertinent legislative history nevertheless indicates that these time frames are not jurisdictional ..

XXX XXX XXX XXX

Related passages of legislative history make equally clear however, that Congress was well aware of the due process problems that may be caused by the prosecution of stale claims. See Legis. Hist. at 624 (discussion of 60-day time limit for the filing of miner's discrimination complaint with the Secretary). The fair hearing process envisioned the Mine Act does not allow us to ignore serious delay by the Secretary in filing a discrimination complaint if such delay prejudicially deprives a respondent of a meaningful opportunity to defend against the claim.

Accordingly, we hold that the Secretary is to make his determination of whether a violation occurred within 90 days of the filing of the miner's complaint and is to file his complaint on the miner's behalf with the Commission "immediately" thereafter -- i.e., within 30 days of his determination that a violation of section 105(c)(1) occurred. If the Secretary's complaint is late-filed, it is subject to dismissal if the operator demonstrates material legal prejudice attributable to the delay.

"Applying these principles to the present record, there is no question that the Secretary seriously delayed in filing the complaint. Nevertheless, the record before the judge did not establish that the Secretary's delay prejudiced 4-A. In the absence of this requisite foundation, the judge erred in granting 4-A's motion to dismiss."

Respondent's basis for dismissal of the complaint is set forth at pages 38 and 39 of its post-hearing brief:

"In a great many cases, a delay of 5 months beyond the statutory maximum would not cause prejudice. This case, however,

occur at all; the time at which the ball mill was in
of being repaired; (to a minor extent) the time at w
Nameth announced at the meeting of October 9 that la
occur; and the dates upon which the events in the Je
memorandum took place. These are likely to be conte
fashion or another in the Government's brief, due to
occasionally ambiguous and uncertain testimony of va
witnesses on the subject of precise dates, or timing
the pertinent dates in a case occur in a relatively
it is much easier for prejudice to occur, and Respon
submit that it has occurred in this case. Had this
been brought 4 to 6 months earlier, recollections co
more quickly canvassed, and a better record prepared

It is concluded that Respondent has not establi
Secretary's delay prejudicially deprived it of a mea
opportunity to defend itself in this matter. There
allegation of any specific prejudice it sustained in
preparation or in the trial of this matter. The gen
allegation that the memory of witnesses may have bee
the delay is insufficient to meet the burden of esta
material legal prejudice; there is no articulation o
by which Respondent was prejudiced. It is also note
delay of approximately 5 1/2 months here is signific
that that - 2 years - involved in 4-A Coal Company,
There being no basis in argument or in the record to
that Respondent was materially prejudiced, its conte
the complaint should be dismissed for untimely filin
It should finally be mentioned that (1) a considerab
the time which elapsed between the allegedly discrim
and trial was accounted for by the extensive pre-tri
and settlement negotiations engaged in by the partie
Respondent, as will be shown within, on the day it l
Complainant was put on notice of possible litigation
taking steps to prepare therefor (See Exs. J-2 and J

General Matters

Respondent, Dee Gold Mining Company, was at all
times a Nevada partnership engaged in gold and silve
(III-T. 61).

Complainant, age 34 at the time of hearing, com
employment with Respondent on March 26, 1984 (Ex. R-
maintenance mechanic (I-T. 69, 73, 75). His immedia
was Allen "Al" Jensen, mill maintenance foreman (I-T
of Complainant's basic duties were repair, fabricati
pipefitting, crusher repair and pump repair (I-T. 77
Various of these duties were performed on or about m
mine which separated the gold ore from waste materia

itten evaluation from Al Jensen rating him as excellent in
ery category (I-T. 80-81).[2] He received no other ratings
ior to his layoff.

While Complainant's work performance was commendable in
ginning, it thereafter deteriorated. A decline in his spee
d attitude was noted by his immediate supervisor, Jensen,
llowing management's refusal to grant the mill maintenance
ew's request for a raise (III-T. 132-134).

With respect to Complainant's attitude, Jensen testified
at: "he would throw things, get a little bit angry about no
ving something to work with." Jensen also noted that
mplainant complained about changes in the work schedule abo
is time, since he was building a house and that his hours b
drop. The records on overtime show that the high point on
mplainant's overtime occurred in July, with 40 hours of
ertime, and dropped to half that in both August and Septemb
ee Exhibit R-2.) By contrast, during the same period Ingle
rked 66 hours of overtime in July, 56 hours of overtime in
gust and 71 hours of overtime in September.

Mr. Jensen, following Complainant's termination, and in
cordance with usual procedures, filled out a Dee Gold stand
vroll Change Notice Form, Joint Exhibit 1, which reflected
ews on Complainant's ability as of the date that he filled
t, October 16, 1984. Complainant's "conduct" and "producti
re listed as "poor," while his "initiative" was listed as o
air." There were no "excellents" in the rating.

In the summer of 1984, the mill maintenance crew [3]
nsisted of Complainant, Wayne Overholser, Joseph P. Timko,
senbarth, Mike Ingle and Mitch Geyer. All but Geyer were "
intenance mechanics". The sixth mill maintenance employee,
chanic Wayne Overholser, worked for only part of the summer
84, before he transferred to the truck shop around Septembe
84 (II-T. 21, 88, 122-124, 136-138; III-T. 15, 42-43, 66).
other employee, Kenneth Kohles, was promoted to and began
rking in mill maintenance, on or about September 1, 1984 (E

Respondent contends that Complainant's work performance
teriorated after this time.

The record with respect to the number and composition of
ew was confused, possibly because of different employees cc
and out of the crew.

Timko was elected mill maintenance safety representative (spokesman) sometime during the period July-September 1 124-126; II-T. 141). Certain of Respondent's management aware he held this position (I-T. 125-126). Mr. Timko off on October 9, 1984 (III-T. 109) shortly after a mee the same date- which was called to discuss complaints (safety complaints) - was conducted with the mill mainte by mill superintendent Steve Nameth. 5/ Mr. Timko, lik Complainant, testified that he understood when he was h it was to be a permanent position (I-T. 122). Crew mem Ingle who was favored over Complainant and Timko in the however, was told when he was hired that there might be "after things were going" (II-T. 99) and that Jensen to was "afraid to hire too many people because of the layo T. 99).

Protected Activities

At some indeterminate time prior to the start-up o in September 1984, Complainant registered a verbal comp his immediate foreman, Al Jensen, concerning not having ing shield. Jensen replied that he would "put some on (I-T. 78).

Complainant also complained (1) to Larry Turner, S Director, and Al Jensen, that he needed a respirator si working with cyanide acid and gasses (I-T. 79, 86-87) o September 25, 1984 (I-T. 87), and (2) about an acid pla 88-89).

Complainant engaged in various activities which Re was aware of in connection with his dissatisfaction wit

4/ It thus appears that during the summer of 1984 and layoffs in October 1984, the mill maintenance crew by a did number six employees. This supports Respondent's p that a layoff of 2 employees was called for to effect c with the Kilburn Report.

5/ The October 9 meeting was a significant event in th of this proceeding and is discussed more fully within.

pondent's so-called "lockout" procedure at the ball mill. plainant initially appraised this problem as follows:

"A The first time that I was informed that they had an emergency and Al Jensen said you've got to go into the mi and fix a liner. I said fine, where do you want me to pu my lock on the motor? Al said well, we can't lock the mo out and I said why is that. He said they don't want to l out the motor and you can lock out the air clutch but I didn't like the way to find the ball mill to lock out the air clutch as opposed to the locking out the motors. If chair for a person who is working in the mill and air mot is still running there is a possibility the clutch could engage by itself, by outside means and the mill would tur

Q. And what would happen if anyone was in the mill?

A. The person would be dead.

Q. What would kill him?

A. Fifty or sixty tons of steel balls that would crush h to death.

Q. What did Al Jensen say when you told him you thought mill *should be locked out*?

A. He said he had to do what he was told.

Q. Who did he say told him that?

A. Nameth."

(I-T. 89-90).

Thereafter, on or about September 25, 1984, Complainant aged in a conversation with Wayne Dillon, a safety resentative of the State of Nevada who had been conducting ety class at the mine, and Larry Turner, Respondent's Safet ector, in which Complainant asked Dillon if Respondent's hanical lockout procedure was in compliance with State or M ulations. Complainant's account of this conversation follo

"Q. And what did Mr. Dillon say?

A. He said absolutely not.

Q. What did Mr. Turner say?

A. Turner didn't say anything

pervisor of mine inspectors, who Complainant understood was
ley's "boss." Frazier, according to Complainant, stated:

"He said it was unacceptable to MSHA to have a mechanical lock out only the air clutch. He said it was a violation of standards. He read me the quotation in the regulation that all energized equipment will be de-energized before any worker will work on that equipment."
(I-T. 93; See also II-T. 30)

On Wednesday morning, October 3, 1984, Complainant advise
. Turner that "... a mechanical lock out was not acceptable
e Reno office." Mr. Turner indicated that he would look int
when he got the time (I-T. 94, II-T. 32). Both on October
d October 5 Complainant asked Turner if he had called Reno a
rner hadn't (II-T. 33). Complainant advised Joe Timko, the
ners' elected mill maintenance safety representative, that h
uld not go into the ball mill under existing conditions (I-T
-96). He also confirmed to Al Jensen that he would not ente
e ball mill (I-T. 97). This constitutes a refusal to work
cause of an asserted unsafe condition.

Complainant gave this account of a final safety complaint
ich occurred on the morning of October 11, 1984, the afterno
which he was laid off:

"Q. Between the time of the Timko lay off and your lay o did you make any safety complaints?

A. Yes, I did.

Q. When did you make any complaints?

A. I think I believe it was Thursday morning, the day I was fired.

Q. When were you fired?

A. I was fired that afternoon.

Q. What was the nature of your complaint?

A. First thing in the morning Al Jensen told me to move welding table approximately ten feet to one side. I objected immediately.

A. Al Jensen. He said this was what Steve Nameth want and this is what he is going to get.

Q. Who informed you of your lay off on the eleventh?

A. No one actually informed me of my lay off.

Q. How did you learn about it?

A. Al Jensen had me do an emergency pipefitting job. set a pipefitting job where I had to put a water line i the feed chute of the rod mill. When I was all done wi this job I went back to put time on my time card and my card was not in the slot. I went to Al Jensen and said well, where is my time card. I asked and he said I cou tell you in an hour and I asked him if I was laid off.

Q. What did you then?

A. I went into Steve Nameth's office.

Q. What did you say to him?

A. Said I am the least productive employee? He said I

Q. What did you say?

A. I said I am going to fight it even with my record a evaluations I have in my record I am still not the leas productive employee.

Q. Did you say on what basis?

A. No. I just said I am going to fight it." 6/
(I-T. 106-107)

It is thus clear in the record and found here that omplainant engaged in various safety activities which in th bstract were of a nature sufficient to invoke the protectio he Act. Respondent for the most part concedes, and the rec

/ It is of some significance in this conversation Complain id not specifically protest that he felt he was being laid- ue to his safety activities.

making more complaints than any other (II-T. 88, 128, 140, 9). Furthermore, all of the mill maintenance crew refused t ter the ball mill with the motor running (II-T. 141, 157, 16

e October 9 Meeting.

After a rumor circulated that Mill Superintendent Steven meth was to issue a company policy that the air clutch lock t would be sufficient and all employees would abide by such licy (I-T. 97, 98), Complainant told Timko that "we should h meeting" with Arthur J. Schwandt, General Manager for the oject and Nameth's supervisor (I-T. 98). Other maintenance ployees asked Al Jensen for such a meeting (II-T. 89).

The meeting was held sometime between 9 a.m. and 11:30 a Steve Nameth's office (I-T. 99, 141; III-T. 101). The mill intenance crew at that time consisted of Complainant, Joseph mko, Dick Eisenbarth, Mike Ingle, Mitch Geyer and as previou ted, Kenneth Kohles (I-T. 99, 103, 141-142; II-T. 88, 162; I-T. 65, 166-167).

Joseph Timko, the safety representative, considered calli meeting with Al Schwandt but did not do so after he learned he "very close" friendship between Schwandt and Nameth (I-T. 36-137). The meeting in any event was called by Nameth after as told by foreman Al Jensen that the men wanted a meeting w chwandt to discuss "complaints" (II-T. 98-100; III-T. 99, 10 meth reported the request to Schwandt who told Nameth "he wa asy" and told Nameth to conduct the meeting (III-T. 100).

The meeting was held in Nameth's office (III-T. 101) and ttended by Nameth, Al Jensen, Complainant, Timko, Ingle and isenbarth. Mitch Geyer and Kohles did not attend the meetin II-T. 129; III-T. 100).

At the beginning of the meeting, Complainant said someth o the effect that the men would like Art Schwandt present at eeting (II-T. 91; III-T. 135) and Steve Nameth indicated tha chwandt would not be present but that he (Nameth) would give chwandt all the pertinent information from the meeting. Nam nen opened up the discussion and Timko raised the subject of aises (II-T. 36-37). Thereafter, work procedures and non-sa ubject matters were brought up and discussed (I-T. 100; II-T 7-42, 90; III-T. 77).

n Complainant's version the most inclusive account-with on
ccuracy as to when the "lockout" discussion occurred - was
t of Nameth:

"The way I remember it, Jones started to speak. I inter
rupted and said I have an announcement to make. I said
we were going to have a lay off that week. Somebody spo
up and said, who is going to be laid off. I said the le
productive employee. They wanted names or somebody said
and I don't think I mentioned the name. Then Jones star
complaining about various things in the mill. I'll see
I can remember some of them. He complained about wage
rates, he complained about work schedules, he complained
about a job he had done in the rock mill making some kin
complaint. If I had done it his way we could have made
in four days but my way took 16 days. He complained abo
the use of the thickness of hard plates we were using fo
wear plates and of course he complained about the ball m
and rock mill lockout procedure. Before he got to that,
Jones-- not Jones, I'm sorry-- Mr. Timko spoke up rebuki
Jones and saying what's all this about. I thought we we
going to talk about lockout procedures and well then, Jo
started talking about lockout procedure. He said it was
safe. It was inadequate. We checked with Bob Morley an
Bob Morley said it was safe and we were legal. Jones th
pulled out a card, I've been to see Bob Morley's boss.
mentioned the man's name, I think some district director
I think his name was Frazier and Frazier said it is not
acceptable. I said I don't know anything about that. I
was Bob Morley who said it was acceptable. Jones said
here's his card, call him right now and I said I would l
into it. He said-- kept repeating, call him right now,
him right now. He kept repeating and I said if you have
nothing further we better go back to work and the meetin
broke up about that time.

Q. Do you recall anything else about that meeting? Let
withdraw that question. Was there a specific number of
people as being identified as people who would be laid o
at the meeting?

A. No.

Q. I couldn't quite hear when you were speaking and did
say it was going to be the least productive employee or
least productive employees going to be laid off?

Q. Was anybody laid off later that week?

A. Yes, George Jones was laid off two days later.

Q. Why was it Timko was laid off first and then Jones?

A. Well, the work Jones was-- Timko was on was not critica to the operation of the plant. Jones was working on a pipe line that was critical." (III-T. 77-79).

Nameth's version of the October 9 meeting is at variance the accounts of all others as to the time when he made the uncement that there would be layoffs. According to Nameth, nterrupted Complainant at the beginning of the meeting to sa ad an announcement to make, i.e., that there would be a lay- Nameth's rendition appears faulty in this one respect and that the layoff announcement did occur after the "lockout" ussion (I-T. 103; III-T. 155). Nevertheless, in all other ects, Nameth's recollection of the October 9 meeting appears lucid and detailed than the others and not being in great ance from Complainant's version it is accepted.

Before the "lockout" discussion, two other safety matters discussed, "face shields" and "hooks welded on a handrail" . 100-101; III-T. 136). It is clear, however, that subjects r than safety matters were also brought up, such as pay es, wage rates, work schedules, and work matters such as e welds, etc. (II-T. 36, 38-42; III-T. 103, 136).

As noted above it appears that Complainant brought up the kout procedure issue, saying it was not safe. Nameth replie MSHA Inspector Bob Morley had said Respondent's lockout od was safe at which point Complainant produced a business from his pocket and said he had gone to Morley's s-Frazier- who said it was not safe. Nameth said he was not e of that (III-T. 103-104). Complainant said "here's his , call him right now." Nameth said he would look into it a lainant kept repeating "Here's his card, call him right now rding to Nameth, Respondent's safety director thereafter acted Frazier and after some procedural processing MSHA ermined Respondent's method was unsafe and that Respondent h lock out the motor (III-T. 104-105).

Following the meeting, Nameth reported to Schwandt. Namet ified:

force." (III-T.89).

Schwandt confirmed Nameth's account of this conversation -T. 36).

On October 9 after discussing the matter with Schwandt, th checked with Al Jensen to "find out what jobs Jones and o were on". Nameth determined that Timko's job was not ical to the operation to be completed that day and that the Complainant Jones was on was critical. He decided to let o go that day and to let Complainant go at the end of his week on October 11 (III-T. 110, 116).

Later in the afternoon of October 9, 1984, Nameth told en that Timko was to be terminated that day. Nameth was n ent when Timko was told by Jensen he was to be laid off -T. 109-114).

Following the layoffs (III-T. 139-140), Nameth asked Jens repare a memorandum (Ex. J-2) with respect to Jones and Ti h Nameth testified "was intended to be seen by myself and andt in case we had problems as we are having right now" -T. 80) and in anticipation of future litigation (III-T. 9 andt also asked Nameth to prepare such a memo to describe dents that led Nameth to believe Complainant Jones and Tim ld be discharged (Ex. J-3; III-T. 80-81).

ondent's Position.

Prior to the opening of the mine an engineering firm burn) prepared an authentication of Respondent's prelimina tal and operating budgets entitled the Kilburn Feasibility tal Cost Study and, as previously noted, referred to herei he Kilburn Report (III-T. 23).

Excerpts from this Report were introduced into evidence a R-1. Such reflect that a total crew of four, 2 mill tenance mechanics and two helpers, were contemplated as th per number" for the mill when its construction was complet it came under "operating conditions." (III-T. 23-25, 135) mill maintenance employees were needed and hired during t od prior to the time the mill began operating (III-T. 26, pproximately September 1984 (I-T. 76).

Sometime around the end of August 1984, shortly after the Steve Nameth took over the supervision of the mill

decided that Timko and Complainant would be the ones who wo
laid off in the reduction-in-force (III-T. 29, 31-33, 34, 4
the time of which would be contingent on the mill's "operat
and was anticipated to be "around" the first week of Octobe
(III-T. 48, 50-51). 7/ Al Jensen was in agreement that Tim
Complainant were the two who should be laid off (III-T. 80)

In this connection, Jensen, who himself had been laid
and was not employed by Respondent at the time of the heari
testified:

"Q. In your view who were the least productive worker
the group at the time of his determination?

A. I had three, George Jones, Joe Timko and Mike Ingl

Q. In ranking among those three who would you have la
off?

A. If I had to do it because George and Joe because M
Ingle was senior of the two.

Q. Now, in-- why was it you regarded Mr. Jones as one
the least productive in the unit?

A. I think it had to do a lot-- seemed like he slowed
you couldn't prove this but it seemed like he had slow
down an awful lot in his work; his temperament had bee
very, very bad-- cussing, throwing things around.

Q. What was the reason that you gave him a poor condu
the general payroll change notice form?

A. Temper.

Q. Jones?

A. Oh, Jones. It was temper, getting mad at any litt
thing." (emphasis added) (III-T. 138)

After he took charge of the mill maintenance crew in A
1984, Mill Superintendent Nameth told the foreman, Al Jense
tell the crew that "we were overstaffed and we were going t
to cut two or three people off." He also told Jensen to "k

7/ According to General Manager Schwandt, employees who we
be laid off (RIF'd) in all cases were not given advance not
(III-T.37).

The decision to terminate Complainant as one of the two laid off in the reduction-in-force was made by Mill Superi ndent Nameth with the approval of General Manager Arthur J. nwandt, in late August 1984 (III-T. 90, 96, 117-119, 122-12 5). The actual date it was determined that Complainant wou laid off on October 11, 1984, was October 9, 1984 (III-T. the time of the layoffs of Complainant and Timko on Octobe d 11, 1984, respectively, Mr. Nameth was the person in mana nt's hierarchy who effectively decided to hire, discharge a yoff employees in the mill maintenance unit (III-T. 60, 96

In his testimony, Nameth described at length the reasons ying off Complainant Jones (and Timko) and the process by w is decision was reached as follows:

"A. The AR plate where Jones put in more than was necess

A. Yes.

Q. That would have been about the twenty-seventh or twe eighth of August.

Q. How important was that particular incident to you i reaching a conclusion?

A. The importance was that it was becoming apparent that Jones wouldn't follow instructions. Also important in fact he wasted a lot of expensive AR plate.

Q. When did the incident with the two by four pieces oc

A. Sometime in July, early August.

Q. And how did you hear about that?

Although Complainant alleges, and various of the crew wh stified said, that the crew had no "advance notice" of the yoffs, Nameth's testimony that he told Jensen that two or the crew were to be "cut" is supported by the testimony o ew member (Geyer) that there was "hearsay going around" th ere was to be a reduction (II-T. 132). Also, as noted abo gle conceded he was told when he was hired that there migh yoffs after things got "going" (II-T. 99). These two identiary items lend support to Respondent's position.

XXX XXX XXX XXX XXX

"A. He was apparently deliberately slowing down. He slow getting to the job. He always complained about he had to work with." (III-T. 87).

XXX XXX XXX XXX XXX

"Did you have authority to reduce the force on your o authority?

A. Probably, I am sure I would have discussed it with Schwandt.

Q. Did you discuss it with Mr. Schwandt?

A. Yes, I did.

Q. When was that?

A. The function was turned over to me on the twenty-f The following Monday would have been the twenty-seven I would-- I'm sure I would have met with him on the t seventh.

Q. What was said during that meeting?

A. I mentioned the fact that we had too many people department and told him of the other operations that been on. He mentioned that there was some kind of st Kilburn that indicated we were supposed to have four mechanics after the operation started up.

Q. Were any people discussed as candidates for a redu in force?

A. Yes.

Q. Who was discussed?

A. Joe Timko and George Jones.

Q. What was said about them by each of you?

A. I mentioned the fact they looked like they were dr their feet. They weren't giving us an honest days wo

discharge chute with no instructions (sic) because we were going to encounter a lot of clay and the chute should be without obstructions. George put the plate in there with protective obstructions and to protect the bolt heads. Somebody had to go back in there and cut them out. That added a lot of time to that job.

Q. Did you mention this to Mr. Schwandt?

A. I don't remember whether I did or not.

Q. I am just trying to find out what you mentioned to him during this meeting?

A. One of the things I mentioned to him, I could see crackers put in the plant, put in the chutes. They didn't put in wear plates and we had an incident with George Jones where what he was instructed to do was braze resistant plates. It's expensive. He had instructions to put in the hard plate to a certain length and he exceeded that and wanted it his own way-- I don't understand that level and when I questioned-- George doesn't know to follow instructions. He likes to do things his own way.

Q. Did you tell that to Mr. Schwandt?

A. Yes, I did.

Q. Did you tell anything else to Mr. Schwandt concerning these two employees or either of them in this meeting you've just described?

A. You are talking about the meeting of the twenty-seventh?

Q. I am talking about the meeting of the week of August twenty-seventh.

A. Actual incidents, no, with the exception of the fact that both Jones and Timko were very slow getting away from the tool room. Where most of the other mechanics would be off in 10 or 15 minutes to their jobs, Jones and Timko very often would be there 30-35 minutes after we started the shift.

Q. Now, did Mr. Schwandt have anything to say with respect to either of those employees?

A. I think Mr. Schwandt made some comments about Joe Timko's work. I don't think he said anything about Mr. Jones.

duction in force? How did the meeting conclude?

A. There was no question at that time we were going to h
a reduction in force. We had made a tentative decision
it would be Jones and Timko but I decided I would watch
of them and see if there was any change in attitude and
havior.

Q. There were no incidents that occurred that week with
Mr. Jones?

A. Yes, there was an incident of the hydrostroke cylinde
Mr. Jones and Mr. Timko were both assigned to remove the
hydrostroke cylinder because it had malfunctioned. We h
to take it apart to where it had malfunctioned. It took
Jones and Timko about eight hours to remove that and rep
it. I felt that was much too long a time.

Q. Was that reported to Mr. Schwandt at anytime during t
week?

A. Sometime during the week, yes. I think it was-- may
been Mr. Schwandt had walked by that job that particular
and observed some of it.

Q. And who was involved in-- with that particular job?

A. Mr. Jones and Mr. Timko. Somebody said that Mike Ing
was there part of the time, but I don't recall seeing hi
(III-T. 68-72)

XXX XXX XXX XXX XXX

Q. Did you have any subsequent meetings with Mr. Schwand
on the subject of the reduction in force?

A. Yes.

Q. When?

A. Sometime during the week of September 16th or 17. I
believe 16th-- early in the week.

Q. What was said during that meeting?

A. I walked in his office and told him I wanted to reduc
these guys, let these guys go now.

or what was it?

A. In the case of Mr. Jones-- I'm sorry, Mr. Timko, had d
a job on me number four conveyor belt skirting. He had
fabricated the skirting, it was all wrong, had to be redo
That was sometime during that period.

Q. What about Mr. Jones, did anything happen to him other
than the hydrostroke cylinder incident?

A. No specific things I can remember except for the fact
observed them apparently working at a slow pace, getting
away from the tool room late, having coffee breaks."
(III-T. 68-73; See also III-T. 117-118).

On cross-examination, Mr. Nameth reiterated his reasons f
cting Complainant and Timko as the two mill maintenance
oyees who should be laid off, and pointed out that his
sion was made before the "lockout" matter arose:

Q. "... as of the twenty-seventh, what in Mr. Jones condu
led you to conclude that he would be a candidate for favo
to be reduced in force?

A. His general conduct about dragging his feet, taking a
long time to leave the tool room to go to his job, the co
crusher charge chute incident that I described-- that was
some of it.

Q. Now, how did you observe his general conduct the fact
that it took him a long time to leave the tool shed? Wer
you standing there watching?

A. Their starting time was 6:30. I would come up to the
mill area about that time. I noticed other mechanics wer
off on their jobs and Timko and Jones were still in that
area gathering up tools, getting ready to be-- to go to a
job.

Q. You didn't say anything to him?

A. I would deal with him through Mr. Jensen. I would com
plain to Mr. Jensen about it.

XXX XXX XXX XXX XXX

to have responsibility of that plant, I was out in the
quite often where Jones and Timko were working. I obse
their work habits at that time but I wasn't directly re
sponsible for them at that time. I formed conclusions
Even at that time I had suspicions, yes. I talked to
about their performance and their performance did not
prove from the day I took over. It seemed to get worse
it wasn't all that good up until that time.

XXX XXX XXX XXX XXX

Q. When did you learn that Mr. Jones had refused to en
the ball mill under the lockout procedure that you had
stituted?

A. You look for an exact date?

Q. Approximately?

A. It would have been about the twentieth or twenty-fi
of September.

Q. And this was after you had already formed the concl
that he would definitely be terminated?

A. I would think so, yes. (III-T. 90-94).

XXX XXX XXX XXX XXX

Q. I believe you mentioned something about a two by fou
that Mr. Jones had thrown on the floor?

A. No, it wasn't one two by four-- a carpenter was work
at a table. He had cut a number of two by fours for a
that he was doing and Mr. Jones came along and asked h
he could have one or some of the two by fours and the
penter said no, I need all that I've got. Mr. Jones i
fit of temper swept everything off the table.

Q. And did this help you to reach a conclusion that he
should be terminated?

A. It didn't help Jones case any. (III-T. 97)

XXX XXX XXX XXX XXX

A. No. There were other reports of Mr. Jones not being to get along with some of the other people around there

Q. Second hand reports?

A. Yes.

Q. But you never checked those out did you?

A. No, I didn't. (III-T. 98).

CONCLUSIONS AND DISCUSSION

e Discrimination Formula.

In order to establish a prima facie case of discriminat der Section 105(c) of the Act, a complaining miner bears t rden of production and proof to establish (1) that he enga protected activity and (2) that the adverse action compla was motivated in any part by that activity. Secretary or half of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 97-2800 (October 1980), rev'd on other grounds sub nom. Co ation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir., 1981); ecretary on behalf of Robinette v. United Castle Coal Co., SHRC 803, 817-18 (April 1981). The operator may rebut the ima facie case by showing either that no protected activit curred or that the adverse action was in no part motivated otected activity. If an operator cannot rebut the prima f se in this manner it may nevertheless affirmatively defend oving that (1) it was also motivated by the miner's unprot tivities, and (2) it would have taken the adverse action i ent for the unprotected activities alone. The operator be e burden of proof with regard to the affirmatively defense ro v. Magma Copper Co., 4 FMSHRC 1935, 1936-38 (November 1 e ultimate burden of persuasion does not shift from the co ainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich SHRC, 719 F.2d 194, 195-96 (6th Cir. 1983); Donovan v. Sta nst., Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984) (specific proving the Commission's Pasula-Robinette test); and Goff oughiogheny & Ohio Coal Company, 8 FMSHRC 1860 (December 19

In terms of the required prima facie case in discrimina mplainant clearly established the first elements thereof, at he had engaged in protected safety activities and that spondent's management was aware thereof prior to the time s laid off.

scriminatory Motivation

The first of the two salient issues posed here are whet

selecting Complainant as one of the two to be laid of

Respondent's second line of defense, the affirma provided under the Commission's discrimination formul frames the second issue: Assuming arguendo that Respo part motivated by Complainant's protected activities, motivated by his unprotected activities and would it have laid him off for his unprotected activities alon

Under the 1977 Mine Safety Act, discriminatory m not to be presumed but must be proved. Simpson v. Ke Inc. and Jackson, 8 FMSHRC 1034, 1040 (1986). Compla order to carry the burden of establishing discrimina vation, seeks to have an inference thereof drawn from circumstantial factors. From gleaning and organizing points from this difficult record and briefs, several and discussed below. It is noted that three of these which are found to lack significant merit - are liste amended complaint and constitute part of the foundati plainant's theory of discrimination.

(a) The Secretary argues that Complainant and Ti shown in the record and characterized by Jensen (III- the two biggest "complainers" and that these were the Respondent selected to lay off.

I construe this characterization by Jensen to at include safety complaints as well as other work-relat non-safety complaints. Nevertheless, various other f the edge off this particular argument. The other mem mill maintenance crew also complained of safety and o matters, also refused to enter the ball mill to do re unless the motor was locked out, specifically complai the lock out procedure, and had arguments ("discussio Nameth.

As far as Timko was concerned, Nameth denied (II and it was not otherwise established, that he had kno Timko had been elected the crew's "safety representat thus draw no carry-over inference that had it been es that Timko was discriminated against, such discrimina should be attributed to Respondent's purposes in also Complainant. It is noted (1) that the Secretary's di case on behalf of Timko was settled and not litigated that the record in this matter does not independently sufficient evidence from which a determination can be whether or not Timko was discriminated against, or mo fically, whether or not Respondent was discriminatori in laying off Timko.

n's demeanor at this meeting was the subject of escriptions, conflicting even among Complainant's own one of whom said that Nameth was irritable even when to the meeting (II-T. 90). After careful scrutiny of , I find no credible, probative evidence that Nameth's t the October 9 meeting was any different than his demeanor which the crew members described in such terms erent", "hostile," "irritable", "angry," etc. (I-T. 81, 4, 151). I find no reliable evidence and I am unable e that any irritability shown by Nameth during the meeting was traceable to or a reaction to the lock out or the expression of safety complaints. The record es there is both consistency and reliability in (1) 's position and the testimony of its various witnesses ayoff decision was made between Schwandt and Nameth o three weeks prior to this meeting, and (2) the bases d by Respondent (heretofore discussed) for the layoff w members and Complainant and Timko in particular.

nother factor urged by Complainant for inferring dis- y motivation is that there was no "advance notice" nt, communication or other specific notification to the at any time that their employment was to be temporary ere would be a layoff at a future time (Complainant's 22).

on prior findings, I conclude that this contention has nd should not be considered part of any basis for discriminatory motivation. Although Complainant that he was not advised at the time of hiring that the as temporary, Ingle was so advised. Geyer testified was a layoff rumor going around which is consistent n's testimony that he told Jensen to tell the crew that wo or three mill maintenance employees would have to be is also consistent with Jensen's testimony that he told nat he "had been told that we already still have too e." I do infer from this evidence that the crew was a layoff was coming prior to the October 9 meeting in e small size of the crew and their poignant sensitivity ent concerns shown in the record.

omplainant alleges: "As justifications for the alleged sion to terminate Jones and Timko, Nameth complained had wasted a lot of expensive AR plate and that Jones were slow in getting away from the tool room. In fact,

hough marked for termination as of the end of August, were
ain on the job until sometime in October. It is inconceiva
t a manager could observe employees wasting half an hour at
start of the shift, consider it important enough to be a
tor in a decision to terminate the employees, and never
plain or take any steps to see that it did not continue for
next six weeks of their employment." (Complainant's Brief
.

As with many of Complainant's assertions, I find little
it in this contention. Nameth's failure to take direct
ciplinary or corrective action himself is consistent with
pondent's intention of laying off employees in the near ter
o Nameth testified that he was "sure" that he expressed a
plaint through Jensen about Complainant's and Timko's
diness (III-T. 30, 91, 93). It is also apparent that short
reafter in mid-September, Nameth asked Schwandt to trigger
off immediately (III-T. 73). According to Nameth, whose
timony I find generally persuasive and reliable, Schwandt
lied: "... we still have a lot of work to do; don't cut you
e to spite your face. Let's wait a few more weeks." (III-T
.

Had Complainant- and Timko- been punitively discharged fo
sting" company "time and money", this argument would have m
ength. However, with a layoff planned in the foreseeable
ure, Nameth's actions are not inconsistent with Respondent'
eral position, nor are they seen as demonstrating a discrim
ory frame-of-mind. By contrast, Complainant's work per-
mance here is seen as providing a business justification fo
pondent's decision to select him for the layoff.

(e) Complainant argues that various work and staffing
isions by Respondent were not "consistent with a business n
reduce the number of maintenance employees." Various of th
nts which are frequently general and not particularly
bative to begin with, are that:

> (i) Kenny Kohles, an inexperienced 19-year old who had
> been hired as a janitor in May 1984, was promoted to t
> mill maintenance crew around September 1;
> (ii) After the layoffs, the crew members who remained
> were required to work considerable overtime;
> (iii) An outside contractor (Western General Contracto
> was brought in to do maintenance work which could have
> been performed by employees of Dee Gold;
> (iv) Complainant and Timko were the only two workers l
> off in 1984.

The record reflects that Respondent did get by with two l

onceived before Complainant (and Timko) were hired; that K
as brought in to replace Overholser who requested a transf
f the crew because of "friction" and that such replacement
he size of the crew constant until such time as the layoff
alled for. Kohles, according to Schwandt, was a "very har
orking young fellow" (III-T. 43) and was "proficient in he
quipment operation" (III-T. 65).

Respondent also credibly explained that the reduction
ill maintenance force was called for even though there was
eduction in other sections of the mine, and that such was
he fact that "we had more people than we had budgeted for"
III-T. 62). Respondent then established that it was "chea
ay a premium for" overtime than to have extra workers due
ost of fringe benefits, such as health benefits (III-T. 40
nd that the work performed by Western General Contractors
ithin the framework of its contract and not a diversion of
rom the mill maintenance crew (II-T. 153; III-T. 37-39).

(f) Complainant contends the after-the-fact written st
ents of Jensen (Ex. J-2) and Nameth (Ex. J-3) were prepare
art of a pretextual business justification for the layoff
omplainant and Timko. Here Complainant contends (Complain
rief, p. 24):

> It is only after the (October 9) meeting, after the te
> nations and after Jones informs Nameth that he is goin
> fight his termination, that Jensen is instructed to wr
> anything negative he can think of relating to the empl
> history of Jones and Timko. Likewise, the self-servin
> memorandum from Nameth to Schwandt only occurs after J
> informs Nameth that he is going to fight. This is alm
> classic scenario of an ex post facto attempt to fabric
> factual justification for a prohibited action already
> taken."

There is no contention -- in this argument-- that any
eficiencies of Complainant and Timko contained in the writ
tatements of Jensen and Nameth did not occur. The point s
o be made is that such were fabricated and after-the-fact
ayoffs and thus should be the basis for an inference of
iscriminatory intent or animus. The response to this cont
ppearing at page 14 of Respondent's brief is found to have
erit.

> "J-2 was not a routine document, rather one prepared f
> the purposes of the litigation. Specifically, it was
> prepared by Mr. Jensen pursuant to Mr. Nameth's reques
> list all of the problems that he, Jensen, had experien
> with Messrs. Jones and Timko

... This memorandum was intended entirely for the int
purposes of Dee Gold, and was not intended for distri
to third parties. ... The only reason the Government
tained it was because it asked for it in its discovery
it was dutifully produced. There is no suggestion in
record that the memorandum was relied upon by any part
in terminating Mr. Jones (although some of the inciden
recounted in it are pertinent); indeed, it is perfectl
plain that it was made following his termination."

I find nothing irregular, suspicious, or nefarious in
fact that Respondent attempted to make a record for its own
purposes after the layoffs in anticipation of future litiga
(III-T. 54-57). Respondent effected no pretense that such
ments were prepared prior to the layoffs. This contention
jected.

At page 16 of its brief, Complainant expresses a relate
concern:

"There is no dispute that management was aware of Jones
safety complaints during the month of September. If, i
fact, they had decided in September to terminate Jones
were, in fact, fearful of "repercussions" would it have
been logical to prepare these memoranda at the time the
decision was made and while Jones was still employed?
timing of these memoranda is additional evidence that t
allegations contained therein were pretextural justifi-
cations for decisions made in October which had nothing
do with ability or productivity."

The record firmly establishes that all members of the mi
intenance crew had expressed safety and other complaints du
e summer of 1984 and were apparently not reluctant in doing
appears- and the the probative evidence establishes-that
spondent had acquired real reason to anticipate litigation
llowing both the October 9 meeting and the "I'll fight it"
nversation between Nameth and Complainant after Complainant
id off on October 11, 1984. The fact that Respondent did n
ocument" Complainant's deficiencies earlier is not illogical
t it is consistent with the position Respondent has taken i
is matter that Complainant was laid off in a long - anticipa
duction-in-force, and was not punitively discharged for un-
tisfactory work performance or other reasons. An inference
t the timing of the obtaining of the Jensen and Nameth stat
ts is indicative of "pretextual justifications" will not be
wn.

(g) As part of the mosaic from which Complai
erence of discri

ponderant probative evidence to the justifications asserte
not to Complainant's protected activities.

(h) The most questionable circumstances raised by Co
plainant arose out of the October 9 meeting and from which
plainant maintains that the timing of the layoff announcem
reflects anti-safety or retaliatory animus. Thus:

> a. the meeting was called for the purpose of discu
> complaints, including safety complaints;
> b. safety complaints were indeed expressed at the
> ing, including the "lock out" problem, and;
> c. after such, and Complainant's revelation that h
> reported the lock out problem to MSHA, Nameth anno
> the layoffs;
> (d) Nameth incorrectly testified that he announced
> layoffs before the lock out issue and Complainant'
> revelation were brought up.

Respondent, however, credibly established that it had
previously planned the layoffs to take place around the ti
October 9 meeting was held. Also, as previously shown,
Complainant's belief and contention that Respondent had no
previously planned, had no justification for, and had made
prior indication to the crew as to, the reduction in crew
was shown to be in error. Further, the quality of this re
does not provide any reliable or persuasive basis to concl
Nameth showed irritability at the meeting, or (b) even ass
that he did, that it was a reaction traceable to the voici
any safety complaint or complaints.

Respondent, on the other hand, persuasively establish
the layoffs were planned long before Complainant was hired
that there existed good and sufficient reason for the sele
of Complainant for the reduction. 9/ In addition, as prev
shown, various of the bases for Complainant's assertion of
discriminatory motivation, tenuous to begin with, did not
up well under scrutiny.

9/ In Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982)
Commission pointed out: "Our function is not to pass on the
wisdom or fairness of such asserted business justification
rather only to determine whether they are credible and, if
whether they would have motivated the particular operator
claimed."

establish that Complainant's layoff was discriminatorily mo
vated, consideration has been given to the fact that the re
is barren with respect to ancillary or background factors
which would reflect a disposition on the part of Respondent
management personnel, singularly or collectively, to engage
such conduct. A prior history of, or contemporary action
indicating, antagonism or hostile reaction to the expressio
safety complaints was not demonstrated. There was no evide
retaliation against other employees who had expressed safety
complaints either in the mill maintenance crew or other
departments.

The record in this proceeding contains no admissions or
other statements, oral or written, from the management perso
involved indicating an anti-safety reporting animus. Indeed
record reflects that none of the employees were threatened o
subjected to retaliation for expressing safety concerns or,
connection with the lock out issue, for not working inside t
all mill.

Direct evidence of actual discriminatory motive is rare
short of such evidence, illegal motive may be established if
acts support a reasonable inference of discriminatory inten
Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHR
508, 2510-11 (November 1981), rev'd on other grounds sub. no
Donovan v. Phelps Dodge Corp., 709 F.2d (D.C. Cir. 1983); San
Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). Th
present record contains no direct evidence that Respondent wa
illegally motivated, nor does it support a reasonable inferen
discriminatory intent.

Ultimate Conclusions.

It is concluded that Respondent's motivation in selectin
Complainant for layoff was for his several unprotected activi
and the business justifications asserted by its management
personnel, Schwandt, Nameth and Jensen, and that such decisio
was justified. It is further found that the adverse action
complained of (layoff) was not in part discriminatorily moti-
vated. Thus, the Secretary failed to establish a prima facie
case of discrimination under Section 105(c) of the Act.

Even assuming arguendo that it were established by a pre-
ponderance of the evidence that Complainant's discharge was
motivated in part by his protected activities, Respondent show
by a clear preponderance of the reliable, probative evidence t
it was motivated by Complainant's unprotected activities and t
it would have taken the adverse action in any event for such.
Gravely v. Ranger Fuel Corp., 6 FMSHRC 799 (1984)

Michael A. Lasher, Jr.
Administrative Law Judge

bution:

l P. Salzman, Esq., Office of the Solicitor, U.S. Depart-
Labor, 71 Stevenson Street, 10th Floor, San Francisco, CA
495 (Certified Mail)

Luther, Esq., Chickering & Gregory, Three Embarcadero
23rd Floor, San Francisco, CA 94111 (Certified Mail)

SEP 8 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 87-129-M
	:	A.C. No. 05-02666-05504
v.	:	Trupp Quarry
NEIL SPRAGUE, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Lasher

Citation No. 2638675 was issued on December 1, 1986, for Respondent's failure to provide for an elevated haulage road. January 28, 1987, a Section 104(b) Withdrawal Order (Failure Abate Order No. 2637460) was issued since the Respondent fail to provide the berm within the time period provided in the Citation and its extension. In issuing the Withdrawal Order, Inspector noted that the Order was written to "replace" the Citation "which was not complied with."

In the parties' joint motion for approval of the settleme the Petitioner moved to vacate the Order since preparation for the hearing "revealed that the failure to build a berm was cau by adverse weather conditions." As part of the settlement the administrative penalty originally sought by MSHA was reduced f $195 to $30. The reduction appears justified in view of the inference to be drawn from the fact that the Withdrawal Order has been withdrawn. I conclude that this reflects a change in Petitioner's initial belief that Respondent did not proceed in good faith to promptly abate the violation after notification thereof. It also appears that this is a small operator (8800 hours worked per year) who had a record of but 3 violations in the preceding 24-month period.

In the premises, the settlement is approved.

ORDER

1. Withdrawal Order No. 2637460 is vacated.

2. Citation No. 2638675 is affirmed.

Secretary of Labor within 30 days from the date of this
sion the sum of $30.00 as and for the civil penalty for the
ation described in Citation No. 2638675.

Michael A. Lasher, Jr.
Administrative Law Judge

ribution:

s H. Barkley, Esq., Office of the Solicitor, U.S. Departmen
abor, 1585 Federal Building, 1961 Stout Street, Denver, CO
4 (Certified Mail)

ns Park Sone, Mr. Neil C. Sprague, 5975 North County Road 2
land, CO 80538 (Certified Mail)

5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SEP 10 1987

PAULA L. PRICE Complainant	:	DISCRIMINATION PROCEEDIN
v.	:	Docket No. LAKE 86-45-D VINC CD 85-18
MONTEREY COAL COMPANY Respondent	:	Monterey No. 2 Mine

ORDER

The attached Amended Decision is hereby issued pursuant Commission Rule 65(c), 29 C.F.R. § 2700.65(c) to correct cler mistakes in the decision in this case issued on September 3, 1987.

Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Linda Krueger MacLachlan, Esq., 314 North Broadway, Suite 1130, St. Louis, MO 63102 (Certified Mail)

Thomas C. Means, Esq., Crowell & Moring, 1100 Connecticut Ave., N.W., Washington, D.C. 20036 (Certified Mail)

JUL 10 1987 previously issued Sept. 3,

L. PRICE	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. LAKE 86-45-D
v.	:	VINC CD 85-18
	:	
EY COAL COMPANY	:	Monterey No. 2 Mine
Respondent	:	

AMENDED DECISION

ances: Linda Krueger MacLachlan, Esq., St. Louis, Missouri for the Complainant; Thomas C. Means, Esq., Crowell & Moring, Washington, D.C. for the Respondent.

: Judge Melick

n July 28, 1985, Paula L. Price filed a complaint of mination with the Secretary of Labor under Section (2) of the Federal Mine Safety and Health Act of 1977, 30 § 801 et. seq., the "Act"[1/], alleging inter alia that ey Coal Company (Monterey) discriminated against her in ion of Section 105(c)(1) of the Act by suspending her for ng to wear metatarsal safety boots provided by Monterey. ice maintains that the boots did not fit, caused foot es and presented a health and safety hazard.

/ Section 105(c)(2) of the Act provides as follows:

ny miner or applicant for employment or representative f miners who believes that he has been discharged, nterfered with, or otherwise discriminated against by ny person in violation of this subsection may, within 0 days after such violation occurs, file a complaint ith the Secretary alleging such discrimination. Upon eceipt of such complaint, the Secretary shall forward copy of the complaint to the respondent and shall ause such investigation to be made as he deems ppropriate. Such investigation shall commence within 5 days of the Secretary's receipt of the complaint, nd if the Secretary finds that such complaint was not rivolously brought, the Commission, on an expedited asis upon application of the Secretary, shall order

Thereafter, on January 7, 1986, the Secretary's representative responded to the Complaint. The letter rea follows:

> Your complaint of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977 has been investigated by a special investigator of the Min Safety and Health Administration (MSHA).
>
> A review of the information gathered during the investigation has been made. On the basis of that review, MSHA has determined that your complaint of discrimination has been satisfied and that no further pursuit of the complaint is required.

---

fn.1/ (cont'd)

the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing; (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

Federal Mine Safety and Health Review Commission
1730 K Street N.W.
Washington, D.C. 20006 (202) 653-5629

ection 105(c) provides that you have the right, within 30
ays of this notice, to file your own action with the
ommission.

fter further unsuccessful efforts to have the Secretary
ent her under section 105(c)(2) of the Act, Ms. Price file
stant proceedings under Section 105(c)(3) of the Act and
what was then Commission Rule 40(b).[2/]

n her initial request to the Commission Ms. Price stated i
s follows:

I would like to file a complaint in my own behalf
oncerning discrimination under section 105(c) of the
ederal Mine Safety and Health Act of 1977. MSHA has
etermined my complaint has been satisfied. I feel it
as only been partially satisfied.

[2/] Commission Rule 40(b), 29 C.F.R. § 2700.40(b),
rovided as follows:

A complaint of discharge, discrimination or interference
nder section 105(c) of the Act may be filed by the
omplaining miner, representative of miners, or
pplicant for employment if the Secretary determines
hat no violation has occurred, or if the Secretary
ails to make a determination within 90 days after the
iner complained to the Secretary.

majority of the Commission invalidated Rule 40(b) in part and stated as follows:

> Section 105(c) does not provide that complainants may file complaints on their own behalf if the Secretary has not determined whether a violation has occurred within 90 days of the filing of the complaint. To the contrary section 105(c)(3) expressly provides that the complainant may file his private action only after the Secretary has informed the complainant of his determination that a violation has not occurred:
>
> > Within 90 days of the receipt of the complaint filed under [Section 105(c)(2)], the Secretary shall notify, in writing, the miner ... of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of [section 105(c)] have not been violated, the complainant shall have the right within 30 days of the Secretary's determination, to file an action on his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)].

Gilbert v. Sandy Fork Mining Company Inc. and Secretary on behalf of Gilbert v. Sandy Fork Mining Company Inc., Dockets No KENT 86-49-D and KENT 86-76-D, slip opinion p.11.

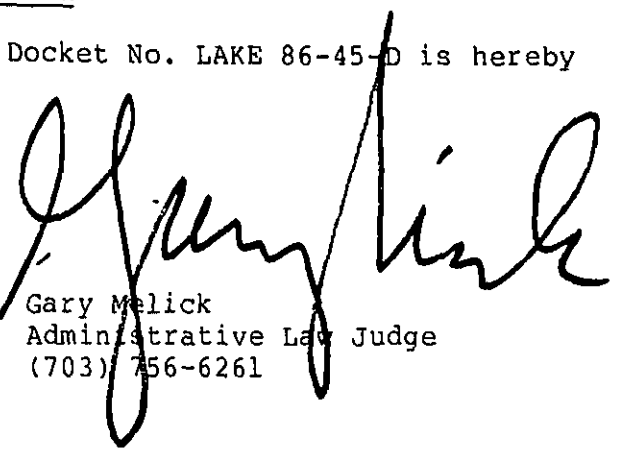
In that decision the majority also held that its ruling therein was applicable to any individual discrimination complai then pending before the Commission.

In light of the above it is clear that I am now without legal authority to continue the instant proceeding under sectio 105(c)(3) of the Act. The Secretary has not informed the Complainant herein of a determination that a violation has not occurred.[3/] Accordingly I have no choice but to dismiss this case.

[3/] On the contrary, testimony at hearings in this case indicates that the Secretary's representatives found that there was a violation of section 105(c) but decided that in light of the purportedly small amount of damages involved and the heavy caseload in the Solicitor's office the case was not significant enough for the Secretary to pursue. Tr. 2589-2590.

ORDER

Discrimination Proceeding Docket No. LAKE 86-45-D is hereby missed.



Gary Melick
Administrative Law Judge
(703) 756-6261

tribution:

da Krueger MacLachlan, Esq., 314 North Broadway, Suite 1130, Louis, MO 63102 (Certified Mail)

mas C. Means, Esq., Crowell & Moring, 1100 Connecticut Ave., ., Washington, D.C. 20036 (Certified Mail)

SEP 15 1987

ARNOLD SHARP, Complainant	:	DISCRIMINATION PROCEEDI
v.	:	Docket No. KENT 86-149-
BIG ELK CREEK COAL CO., INC., Respondent	:	No. 1 Surface Mine

SUPPLEMENTAL DECISION

Appearances: Leon L. Hollon, Esq., Hazard, Kentucky, for Complainant; Stephen C. Cawood, Esq., Pineville, Kentucky, for Respondent.

Before: Judge Fauver

A decision on liability was entered on July 22, 1987, holding that Respondent discharged Complainant in violation o § 105(c)(1) of the Federal Mine Safety and Health Act of 197 U.S.C. § 801 et seq., on May 28, 1986. The decision provided that the parties should meet in an effort to stipulate the am of back pay, interest and litigation expenses due the Complainant, and to submit a proposed order for relief.

The parties have submitted a proposed order, agreed to b Complainant and the attorneys for Complainant and Respondent, with their motion for approval of the settlement reflected by proposed order.

Paragraphs one through six of the proposed order, with m changes, are approved, but paragraphs seven and eight are not deemed to be appropriate in an order for relief under the statute.

ORDER

Based upon the proposed order as approved herein, it is ORDERED that:

1. Within three days following receipt of this Order Respondent shall pay to the Complainant the total sum of $45,0 representing past wages, together with interest and all

prevailing rate for said classification (or $9.00 per hour), sa reinstatement to be effective immediately upon receipt of this Order.

3. At the conclusion or termination of Respondent's operations or services for Blossom Coal Company at Respondent's No. 1 Surface Mine, Respondent shall transfer the Complainant, cause the Complainant to be transferred, to either a mining operation conducted by Red Star Coal Company or a mining operation conducted by Golden Oak Mining Compay, in a job classification to be determined by the Respondent, provided, however, that Complainant shall receive for such job classification the prevailing pay scale for rock truck drivers the mining operation to which he is transferred.

4. Should a rock truck driver's job become available at such new mine location, Respondent shall offer such rock truck driver's job to Complainant, if he remains in the Respondent's employment at the time such rock truck driver's job becomes available.

5. Respondent shall retain Complainant in Respondent's employment for a period of at least one year from the date of reinstatement under this Order, provided, however, that Complainant shall satisfactorily perform his job and comply wi Respondent's work rules and provided that Respondent or its affiliates remain in the coal business in Eastern Kentucky.

6. Respondent shall pay to Leon L. Hollon, Esq., counsel for the Complainant, a reasonable attorney's fee to be approve by the Judge.

The decision entered on July 22, 1987, shall not be made final until an order is entered herein approving an attorney's fee for Complainant's attorney.

William Fauver
William Fauver
Administrative Law Judge

Arnold Sharp,
Complainant

Leon L. Hollon
Counsel for Complainant

Stephen C. Cawood
Counsel for Respondent

Distribution:

Leon L. Hollon, Esq., P.O. Drawer 779, Hazard, KY 41701 (Certified Mail)

Stephen C. Cawood, Esq., Cawood & Fowles, P.O. Drawer 280 Pineville, KY 40977 (Certified Mail)

slk

5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SEP 18 1987

AL UNION 1810, DISTRICT 6, HITED MINE WORKERS OF ERICA (UMWA), Complainant	:	COMPENSATION PROCEEDING Docket No. LAKE 87-19-C
v.	:	
CO MINING COMPANY, Respondent	:	Powhatan No. 6 Mine

DECISION

arances: Earl R. Pfeffer, Esq., Washington, DC, for Complainant;
Thomas C. Means, Esq., Washington, DC, for Respondent.

re: Judge Fauver

SUPPLEMENTAL DECISION ON COMPENSATION

This proceeding was brought by the UMWA under § 111 of the ral Mine Safety and Health Act of 1977, 30 U.S.C. l et seq., for compensation for miners idled by a fication of a 104(d)(2) order.

A decision on the merits was entered on August 4, 1987, ing that Complainant is entitled to the compensation claimed. decision provided the parties an opportunity to stipulate the nt of compensation and provided that, "This Decision shall be made final until a Supplemental Decision on Compensation ntered herein."

Based upon the record as a whole, including the parties' nearing stipulation of the compensation due under the earlier sion, this Supplemental Decision awards compensation and rs payment of the compensation due plus interest.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay a total of

William Fauver
Administrative Law Judge

Distribution:

Earl R. Pfeffer, Esq., United Mine Workers of America, 900 15th St., N.W., Washington, D.C. 20005 (Certified Mail)

Thomas C. Means, Esq., Crowell & Moring, 1001 Pennsylvania Ave. N.W., Washington, D.C. 20004 (Certified Mail)

kg

ATTACHMENT A

WAGES OF 87 HOURLY PERSONNEL PLACED ON LAYOFF STATUS OCTOBER 6, 7, 8, - 1986

CK NO. & NAME	TOTAL 3-DAY WAGES
C. Neff	$ 372.36
W. Wain	372.36
G. Palmer	372.36
H. Cox	346.74
R. Parish	346.74
K. Roe	346.74
P. Barath	346.74
G. Makara	346.74
T. Ackerman	346.74
D. Dixon	346.74
R. Betts	346.74
K. Neal	348.48
J. Holskey	348.48
J. Jeffers	372.36
R. Wiggins	372.36
R. Basham	353.82
J. Thornton	372.36
R. Shreve	372.36
T. Brill	353.82
M. McCollum	372.36
R. Jeager	372.36
J. Grear	372.36
M. Ackerman	372.36
T. Myers	353.82
D. Cunningham	362.76
J. Graham	362.76
F. Keylor	362.76
J. Warner	337.14
D. Hughes	337.14
L. Palmer	337.14
T. Cunningham	338.88
S. Gossett	337.14
J. Douglass	337.14
S. Benson	337.14
R. Kline	337.14
J. Scott	337.14
T. Lowe	337.14
P. Scott	337.14
J. Broemsen	337.14
G. Cline	337.14
W. Myers	345.84
J. Thoburn	362.76
J. Mellott	362.76
D. Campbell	344.22
M. Garten	344.22
E. Parker	362.76
T. Watson	344.22
R. Major	344.22
B. Hoskinson	362.76
J. Faldoski	

4225	M. Goddard	344.34
4403	B. Clary	344.34
4483	G. Garczyk	344.34
4551	B. Stacy	344.34
4552	B. Evans	344.34
4557	R. Jones	344.34
4607	S. Boston	344.34
4506	J. Eichhorn	360.24
4505	D. Eichhorn	344.34
4413	E. Christman	369.96
4627	K. McFarland	351.42
4553	D. Davis	351.42
2869	G. Goddard	369.96
4469	C. Thompson	369.96
4618	M. Voleck	369.96
4492	J. Arbogast	369.96
4319	W. Holland	351.42
4619	R. Homan	351.42
4272	S. Hayes	351.42
4436	M. Zaborek	351.42
4361	B. Knight	351.42
4411	C. Carpenter	346.08
	TOTAL	$30,424.08

NE SAFETY AND HEALTH	:	
MINISTRATION (MSHA),	:	Docket No. WEVA 87-66
Petitioner	:	A. C. No. 46-01433-03736
	:	
v.	:	Loveridge No. 22 Mine
	:	
OLIDATION COAL COMPANY,	:	
Respondent	:	
OLIDATION COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 87-8-R
v.	:	Order No. 2841392; 9/9/86
	:	
RETARY OF LABOR,	:	Loveridge No. 22 Mine
INE SAFETY AND HEALTH	:	
DMINISTRATION (MSHA),	:	
Respondent	:	

DECISION
and
ORDER OF DISMISSAL

earances: Therese I. Salus, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner/Respondent; Michael R. Peelish, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent/Contestant.

ore: Judge Koutras

Statement of the Proceedings

The captioned civil penalty proceeding concerns a proposal assessment of civil penalty filed by the petitioner against respondent pursuant to section 110(a) of the Federal Mine ety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a il penalty assessment of $750 for an alleged violation of datory safety standard 30 C.F.R. § 75.400, as stated in a tion 104(d)(2) "S&S" Order No. 2841392 served on the respon- on September 9, 1986. The order was issued after the pector observed accumulations of float coal dust on the mine

floor along a conveyor belt [illegible] test proceeding concerns Consolidation Coal's challenge to the legality of the order.

The respondent/contestant filed a timely answer and conte and the cases were consolidated for hearing with several other cases in Morgantown, West Virginia, during the hearing term August 25-26, 1987. However, when the cases were called for trial, the parties advised me that they had reached a settlement in the civil penalty case, and that upon approval of the settlement, the contestant will withdraw its contest. Under circumstances, the parties were afforded an opportunity to present oral arguments on the record in support of their proposed settlement (Tr. 3-8). The proposed settlement was approved from the bench, and my decision in this regard is herein re-affirmed

Discussion

In support of the proposed settlement of the civil penalty case, the parties presented information pertaining to the six statutory criteria found in section 110(i) of the Act. They also discussed and disclosed the facts and circumstances with respect to the issuance of the violation, and a reasonable justification for a reduction of the original proposed civil penalty assessment. The proposed settlement requires the respondent to pay a civil penalty assessment of $450 for the contested violation in question.

Conclusion

After careful review of the pleadings filed by the parties and upon consideration of the arguments made in support of the proposed settlement of the civil penalty case, I conclude and find that the settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.30 the settlement is APPROVED.

ORDER

Respondent IS ORDERED to pay a civil penalty assessment in the amount of $450 in satisfaction of the violation in question within thirty (30) days of the date of this decision and order and upon receipt of payment by the petitioner, the civil penalty proceeding is dismissed. In view of the settlement disposition of the civil penalty case, contestant's request to withdraw its contest IS GRANTED, and it IS DISMISSED.

George A. Koutras

r, Room 14480 Gateway Bldg., 3535 Market St., Philadelphia,
04 (Certified Mail)

R. Peelish, Esq., Consolidation Coal Company, 1800
con Rd., Pittsburgh, PA 15241 (Certified Mail)

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

SEP 21 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 86-67 A.C. No. 11-00599-03631
v.	:	Orient No. 6 Mine
FREEMAN UNITED COAL MINING COMPANY, Respondent	:	
and	:	
UNITED MINE WORKERS OF AMERICA, LOCAL UNION NO. 1591, Intervenor	:	

DECISION

Appearances: Rafael Alvarez, Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
Harry M. Coven, Esq., Gould & Ratner, Chicago, Illinois, for Respondent;
Larry G. Eubanks, United Mine Workers of America, Local Union 1591, Benton, Illinois, for Intervenor.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating a safe regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act).

A hearing on the merits took place in St. Louis, Missouri March 10, 1987.

Issues

The issues are whether a violation occurred. If a violati occurred, was it of a significant and substantial nature. Fina if the citation is affirmed what penalty is appropriate.

§ 75.316 Ventilation system and methane and dust control plan.

[Statutory Provisions]

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

Stipulation

he hearing the parties stipulated as follows:

The Federal Mine Safety and Health Review Commission diction over these proceedings.

Freeman United Coal Mining Company is a subsidiary of Service Corporation.

Material Service Corporation is a subsidiary of General Corporation.

Freeman United Coal Mining Company owns and operates the . 6 mine.

The Orient No. 6 mine is an underground mine, which bituminous coal.

The Orient No. 6 mine extracted 1,429,622 tons of coal uary 26, 1985 to February 26, 1986.

February 26, 1985 to February 26, 1986.

(8) Respondent's business affects commerce.

(9) Respondent's business will not be affected by the pay of the proposed assessment of $950.00.

(10) Orient No. 6 is a gassy mine.

(Tr. 8, 9, 68).

Summary of the Evidence

Secretary's Evidence

John D. Stritzel and Larry Eubanks testified for the Secretary.

JOHN D. STRITZEL, a ventilation specialist, has been a co mine inspector with MSHA since 1971. His specialty includes reviewing plans and checking their adequacy (Tr. 15, 16). His expertise includes training in Beckley, West Virginia (Tr. 16,

Prior to working for MSHA he started the safety division respondent and served as a foreman trainee (Tr. 16-18).

On December 11, 1985 he conducted a technical ventilation inspection at the Orient No. 6 mine (Tr. 18). The inspection consisted of Stritzel's immediate supervisor, Mark Eslinger, a well as Larry Eubanks of the UMWA; Howard Hill represented respondent (Tr. 19, 23).

The inspector took notes and drew a map of the area (Tr. 23, Ex. P3). He stopped between room 31 and room 32 at the la open crosscut in the intake entry. As he passed through the p through curtain he observed a shuttle car being loaded at the (Tr. 24, 54). He also observed the curtain down in the corner room 31. There was about a three-foot gap in the plastic curt He did not know how long the gap had existed. He then began t take an air reading after first turning on the scrubber (Tr. 2 64, 65). The air reading was taken with an anemometer. 1/

1/ An anemometer is a device that measures the flow of air in per minute (Tr. 29).

The inspector then directed the miners not to rehang the curtain until he took his air reading (Tr. 29, 30). He calcula the air flow at 1662.5 cubic feet per minute, (cfm), at the end the line curtain (Tr. 30, 31). He then advised Paul Little, th section foreman, that a violation existed (Tr. 31). Little sai thought there should be an air velocity of 3000 cfm in the entr Mark Eslinger said 5000 cfm was required (Tr. 32). An order wa issued; the ventilation plan requires 5000 cfm (Tr. 33, Ex. P4)

The order was issued because the condition they found shor circuited the air from the face area. The inspector issued a 104(d)(2) 2/ order because the section foreman didn't know how air was required. The inspector believed it constituted an un- warrantable failure for the company to put in a man who did not know the air requirement in the gassy mine (Tr. 34, 35). Littl stated this was his second day in the working section. His pri experience was as a belt and construction foreman for 15 years (Tr. 35).

The company abated the violation by having the entire crew repair the hole and reposition the curtain. They then had 5800 (Tr. 36).

The inspector concluded that the violation was S & S becau the volume of air was approximately a third of the required amo But he did not know how long this condition existed. An igniti would be possible if a buildup of methane gas occurred in this gassy mine (Tr. 41, 42, 45). The inspector further felt that t gravity of the violation could affect the two miner operators a the buggy runner. In addition, the operator's negligence was h (Tr. 42, 43).

In considering whether a violation is S & S, various facto to be considered include the duration and the seriousness of th condition (Tr. 45, 46). The inspector felt the condition descr in his order existed for probably two minutes (Tr. 46).

2/ The parties stipulated that a predicate 104(d) order was iss (Tr. 38, Ex. P5).

The methane concentration in the section was not dangerous; asured one-tenth of one percent (Tr. 47, 49).

It was necessary to turn the scrubber on so they would know uch air was coming out at the end of the line curtain. The ber pulls out about 1000 cfm (Tr. 62).

The shift started at 8:00 a.m. and the inspector's air reading aken at 9:35 a.m. (Tr. 63).

No reading was taken between the time the three-foot opening losed and the repositioning of the curtain (Tr. 65). The ctor had not observed any excessive gaps in the curtain before s repositioned. The three-foot hole and the minimal air at nd of the line curtain were the only violations (Tr. 66).

LARRY G. EUBANKS is a coal miner for respondent. He is ntly a laborer and pit committeeman for the UMWA (Tr. 71).

The witness was a member of the inspection team (Tr. 73). underground he made notes during the investigation (Tr. 75, 7). During the inspection Little said the required air was cfm.

Eubanks saw the hole in the curtain. The air reading was cfm (Tr. 76, 78).

Respondent's Evidence

Robert Newton and Howard O. Hill testified for respondent.

ROBERT NEWTON, a shuttle car operator for respondent, is ntly unemployed. On December 11, 1985, he was unloading coal the continuous miner. With his on-side standard shuttle car ok coal to the tail belt (Tr. 88, 89, Ex. R2, R4) The off- car will become entangled and will tear down curtains when is a lot of air coming through (Tr. 89).

The off-side buggy follows a different route than the on-side (Tr. 91, Ex. R4).

It takes about four or five minutes between the time the buggy lled and until it unloads at the belt tail. When operating uggy the witness always looks back to be sure the curtain t been torn down. The off-side car operator doesn't have this tage (Tr. 94). On his trip to the belt tail the curtain was od shape (Tr. 96). After dumping his load and returning to ining machine he was sitting in the crosscut waiting for the

he inspector directed him not to rehang the curtain (Tr.
-104, 113, 115). About 16 or 18 feet of curtain had beer
wn. Newton estimated he could rehang the curtain in thre
minutes (Tr. 99, 100). The cable of the off-side machir
equently become entangled with the curtain (Tr. 100).

wton identified the position of the tear on Exhibit R4
2, Ex. R4). If he had not been stopped by the inspector,
tain would have been down no more than five or six minute
2).

WARD O. HILL, a field ventilation engineer, is a retired
ee of respondent (Tr. 123). The witness, who helped devel
tilation plan, producted the pre-shift and shift reports
g December 11, 1985 (Tr. 124, 125, 158). The reports in-
all of the faces and entries had been determined to be s
cation of methane gas was found (Tr. 126, 127). The vent
in the intake entry was 14,400 cfm and 12,000 cfm at the
f return (Tr. 127, 129, Ex. R6).

e witness accompanied the inspection team and observed th
0 feet of the curtain was down.

e inspector's initial air reading was about 1600 cfm; the
e was almost 6,000 cfm (Tr. 139). Mr. Stritzel and Eubar
id there was a 2- to 3-foot opening in the curtain. The
opening would still leave enough air at the end of the
rtain. But a 16- to 20-foot gap would have totally short
ed the air (Tr. 131, 132).

Hill's opinion 14,400 cfm of air on the intake is suffi-
Further, in his opinion, the inspector did not correctly
e the conditions for which he issued the citation (Tr. 14
curtain had been restored by Mr. Newcom, the ventilation
ave been around 7,000 cfm (Tr. 146). Further, in Hill's
the curtain was down less than five minutes (Tr. 147).
he practice in this mine to rely on intake air readings t
ne whether it is safe to cut coal at the face (Tr. 151).

Hill's opinion a 16- to 20-foot gap in the curtain would
a hazard over a period of time (Tr. 153, 154). Methane
uild up to the point of ignition (Tr. 154).

Discussion

The credible evidence adduced by the inspector shows he took an air reading after he observed a three-foot ga line curtain. On the other hand, the credible evidence respondent's witnesses establishes that the off-side shu became entangled in the line curtain at about the same t thereby tearing an 18- to 20-foot gap in the curtain. U conditions the air velocity was measured at 1,662 cfm.

Respondent initially contends that the Secretary di establish a violation. I disagree. The evidence is unc that the air velocity measured 1,662 cfm at the end of t curtain. A velocity of 5,000 cfm is required. Accordin Secretary's evidence establishes a violation of the regu

Respondent further asserts that the inspector inter the mining cycle when he ordered the employee to stop ha curtain. Further, respondent argues that such action co a violation of MSHA's policies.

Respondent's arguments lack merit. It can hardly b sidered a part of any mining cycle for a shuttle car to a portion of the line curtain. It accordingly follows i proper, as the operator urges, to issue an advisory dire the inspector prohibiting such activities. Respondent c MSHA directives and no case law in support of its view t inspector overreached his authority in prohibiting the s operator from rehanging the curtain while he took an air

Respondent further claims the inspector did not acc recreate the conditions he initially observed. Further, operator claims the air measurement did not reflect a th hole in the blowing line curtain.

Respondent's arguments are misdirected. It is true respondent's expert witness testified that a three-foot the curtain would not cause the cfm to drop sufficiently inadequate air. However, the violation occurred when th velocity was below 5,000 cfm. It is immaterial whether velocity was caused by a three-foot gap or a twenty-foot

The Secretary contends that the violation herein wa S & S and that it constituted an unwarrantable failure o of the operator.

ificantly and substantially contribute to the cause and effect coal or other mine safety or health hazard." 30 C.F.R. 4(d)(1). A violation is properly designated significant and tantial "if, based upon the particular facts surrounding the ation there exists a reasonable likelihood that the hazard ributed to will result in an injury or illness of a reasonably ous nature," Cement Division, National Gypsum Co., 3 FMSHRC 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the ission explained its interpretation of the term "significant substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, , the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S.Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

In the instant case there was no methane hazard and the re- ion of the air flow only lasted a short time.

An unwarrantable failure occurs if the operator is in- erent, shows a willful intent or if there is a serious lack easonable care. U.S. Steel Corporation, 6 FMSHRC 1423, 1437 4). The record fails to establish the necessary factors to blish unwarrantable failure on the part of the operator.

The inspector's opinion was based, in part, on the fact the foreman did not know the amount of air required at the en curtain. This factor, in and of itself, is insufficient to e tablish an S & S violation or an unwarrantable failure within Commission decisions outlined above.

Civil Penalty

The statutory criteria to assess civil penalties is cont in 30 U.S.C. § 820(i).

The stipulation of the parties addresses the size of the business of the operator and the effect of a penalty on its a to continue in business. The company has an adverse prior hi which is high: in the period ending September 3, 1986, the co incurred 571 violations and was assessed $68,141. The operat negligent but the gravity of the violation was low since the lative condition existed only for a minimal period of time. company's good faith is apparent in that the inspector interr the abatement effort. On balance, I deem a civil penalty of to be appropriate.

Conclusions of Law

Based on the entire record and the factual findings made the narrative portion of this decision, I enter the following conclusions of law:

1. Respondent violated 30 C.F.R. § 75.316.

2. Citation 2823383 should be affirmed and a civil pena assessed.

ORDER

Based on the foregoing facts and conclusions of law I en the following order:

Citation 2823383 is affirmed and a penalty of $200 is assessed.

John J. Morris
Administrative Law Judge

y M. Coven, Esq., Gould & Ratner, 222 North LaSalle Street,
e 800, Chicago, IL 60601 (Certified Mail)

Larry G. Eubanks, United Mine Workers of America, Local 1591,
East Grayson, Benton, IL 62812 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

SEP 22 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: CIVIL PENALTY PROCEEDIN : : Docket No. WEST 87-101 : A.C. No. 42-00121-03634 :
v.	: Docket No. WEST 87-207 : A.C. No. 42-00121-03644 :
UTAH POWER AND LIGHT COMPANY, Respondent	: Deer Creek Mine :
UTAH POWER AND LIGHT COMPANY, Contestant	: CONTEST PROCEEDINGS :
v.	: Docket No. WEST 87-4-R : Citation No. 2504025; 9/ :
	: Docket No. WEST 87-5-R : Citation No. 2504224; 9/ :
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	: Docket No. WEST 87-6-R : Citation No. 2504226; 9/ :
	: Docket No. WEST 87-7-R : Citation No. 2504227; 9/ :
	: Deer Creek Mine

DECISION

Before: Judge Lasher

Based on the Secretary's motion, Utah Power and Light Company agreeing, to vacate the four Citations involved in t consolidated penalty/contest proceedings, and good cause app ing therefor, it is ORDERED,

1. The Secretary's motion is GRANTED.

2. Citation No. 2504025 (Dockets WEST 87-101 and WEST 87-4-R), and the three Citations involved in penalty Docket 87-207, 2504224 (Docket WEST 87-5-R), 2504226

nue, NW, Washington, D.C. 20004-2505 (Certified Mail)

Frank Fitzek, Miners' Representative, Utah Power and Light
pany, P.O. Box 310, Huntington, UT 84528 (Certified Mail)

s

SEP 25 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF JAMES C. GRAY, JR., Complainant	:	DISCRIMINATION PROCEEDIN Docket No. KENT 86-55-D BARB CD 85-47
v.	:	
CHANEY CREEK COAL CORP., B. D. C. COAL CORPORATION, and WOODS CREEK CORPORATION, Respondents	:	

ORDER APPROVING SETTLEMENT
AND DISMISSING PROCEEDING

Before: Judge Maurer

On September 21, 1987, the Secretary submitted a settlement agreement, signed by all parties to this proceeding, including the individual complainant himself, for approval.

By the terms of the settlement agreement, the respondents have agreed to pay to James C. Gray, Jr., the total sum of $16,365 in full and complete settlement of his claim. There is no longer any issue of reinstatement in the case. Respondents have further agreed to expunge from Mr. Gray's record any reference to his discharge in this case. The Secretary of Labor has agreed to waive pre-judgment interest and the civil penalty.

I have considered the agreement in the light of the policies of the Act and conclude that it should be approved.

Accordingly, the settlement agreement IS APPROVED, and, subject to the payment of the agreed amount, $16,365, to Complainant Gray, this proceeding IS DISMISSED.

Roy J. Maurer
Administrative Law Judge

Muth Goodman, Esq., Miller, Griffin & Marks, P.S.C., 700
ty Trust Bldg., Lexington, KY 40507 (Certified Mail)

Don Chaney, B. D. C. Coal Corp., Rt. 1, Box 286-B, East
adt, KY 40729 (Certified Mail)

ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEST 88-230 M A.C. No. 42-01423-05503
v.	:	Triple C Gravel Pit
TIMBER LAKES CORPORATION, Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicit U.S. Department of Labor, Denver, Colorado, for Petitioner;
Mr. Veigh Cummings, President, Timber Lakes Corporation, Murray, Utah, pro se.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating safe regulations promulgated under the Federal Mine Safety and Hea Act of 1977, 30 U.S.C. § 801 et seq., (the "Act").

After notice to the parties, a hearing on the merits toc place on January 7, 1987 in Salt Lake City, Utah. The partie waived their right to file post-trial briefs.

Issues

The issues are whether respondent violated the regulatic so, what penalties are appropriate.

Citations

Respondent is charged with violating four safety regulat

Citation No. 2644388 alleges a violation of 30 C.F.R. § The regulation, in its pertinent part, provides as follows:

SUBPART C - REPORTING OF ACCIDENTS, INJURIES, AND ILLNESSES

§ 50.20 Preparation and submission of MSHA Report Form 7000-1 - Mine Accident, Injury, and Illness Report.

(a) Each operator shall maintain at the mine office a supply of MSHA Mine Accident, Injury, and Illness Report Form 7000-1. These may be obtained from MSHA Metal and Nonmetallic Mine Health and Safety Subdistrict Offices and from MSHA Coal Mine Health and Safety Subdistrict Offices. Each operator shall report each accident, occupational injury, or occupational illness at the mine. The principal officer in charge of health and safety at the mine or the supervisor of the mine area in which an accident or occupational injury occurs, or an occupational illness may have originated, shall complete or review the form in accordance with the instructions and criteria in §§ 50.20-1 through 50.20-7. If an occupational illness is diagnosed as being one of those listed in § 50.20-6(b)(7), the operator must report it under this part. The operator shall mail completed forms to MSHA within ten working days after an accident or occupational injury occurs or an occupational illness is diagnosed. When an accident specified in § 50.10 occurs, which does not involve an occupational injury, sections A, B, and items 5 through 11 of section C of Form 7000-1 shall be completed and mailed to MSHA in accordance with the instructions in § 50.20-1 and criteria contained in §§ 50.20-4 through 50.20-6.

Citation No. 2644389 alleges a violation of 30 C.F.R. § 56.18020. The regulation provides as follows:

§ 56.18020 Working alone

No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless he can communicate with others, can be heard, or can be seen.

Citation No. 2644390 alleges a violation of 30 C.F.R. § 56.15002. The regulation provides as follows:

§ 56.15002 Hard hats.

All persons shall wear suitable hard hats when in or around a mine or plant where falling objects may create a hazard.

Citation No. 2644391 alleges a violation of 30 C.F.R. § 56.14029. The regulation provides as follows:

§ 56.14029 Machinery repairs and maintenance.

Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments.

Summary of the Evidence

Richard H. White, a person experienced in mining, has b MSHA inspector for 10 years. In May 1986 he inspected respo a sand and gravel operation (Tr. 8-10).

The inspection occurred because Ray Cailloutte, an emp reported to the MSHA office that an accident had occurred. report had been filed at the office prior to May 5, 1986 (Tr

In checking at the site the inspector learned Caillouet been struck in the head by a 24-inch pipe wrench when he was attempting to restart a tail pulley (Tr. 12, 13). After tak some measurements and photographs the inspector interviewed Caillouette (Tr. 13, 14).

After the interview he contacted Dave Cummings, the for of the crusher operation. The inspector and Cummings then c the equipment. Cummings did not know if the accident had be reported to MSHA. Caillouette was not back at work on May 6 he was still having problems with his head and still under a doctor's care (Tr. 14, 15).

ne interview between Caillouette and the inspector formed the for the citations in the case (Tr. 16).

rom his investigation the inspector concluded that on the the accident Caillouette, who had 22 years of experience, ned his routine duties. This included running the loader, the feed trays and crushing rock (Tr. 21, 54).

uring the day Cummings, the foreman, went into Salt Lake City pplies (Tr. 21). No other person was at the site (Tr. 22). t 4:00 p.m. the conveyor belt in front of the feed tray d (Tr. 22, Ex. P, P4). Caillouette went below the hopper neasures 17 inches from the outside wall to the structure of nveyor belt. With the aid of a 24-inch pipe wrench and a pot cheater bar he tried to get the conveyor belt to move. nveyor belt was not shut off or blocked; it moved and the rench struck him in the head (Tr. 23, 24, Ex. P4, P5).

aillouette said he was unconscious for 15 to 20 minutes. his head was hurting he wanted to drive home. When he o work the next day he again became dizzy and returned home 5). Berg, who was present after the accident, is an inde- t truck driver hauling materials (Tr. 26).

he first citation was written due to the operator's failure ort an accident within 10 days (Tr. 27). MSHA Inspector had given Form 7001 to the operator two years before ccident occurred (Tr. 27). The citation was abated after mpany filled out the MSHA form (Tr. 29). The inspector be- the failure to notify involved a high degree of negligence 9).

aillouette stated he was working alone at the time of the nt; further, he had been working alone most of the day. spector also considered the work to be hazardous (Tr. 30). running the loader on a built-up bank; also moving parts hazardous. In addition, the area below the feed trap was ed and very hazardous (Tr. 31).

here was a telephone in the electrical control trailer van, 75 feet from the feed trap area (Tr. 32). Caillouette also ted it was a regular practice to work alone at that pit. oreman also knew Caillouette was working alone (Tr. 33).

The inspector considered the "working alone" citation to
S & S violation. It was reasonably likely to cause an acciden
it happened it was reasonably likely to be serious. Both of t
events came to pass (Tr. 34).

Caillouette spent some time in the hospital and he was una
to work for a month (Tr. 35). Accordingly, the inspector felt
violation was reasonably likely to result in a reasonably seric
injury (Tr. 35). The "working alone" citation involved a high
degree of negligence because the practice was known to manageme
(Tr. 35).

Caillouette also related to the inspector that he was not
wearing a hard hat at the time of the accident (Tr. 35). There
could be falling objects in the area where he was working (Tr.
Ex. P1, P2). The foreman indicated hard hats were available.
hard hat not only protects your head from falling objects but
protects your head when going into low areas. Failure to wear
ard hat can cause head injuries, concussions and lacerations.
uch injuries are serious (Tr. 37, 38).

The Kolberg conveyor belt equipment had not been turned off
Tr. 39, 40, Ex. P1, P3, P5). He was repairing the equipment to
et it to run without turning it off or blocking it (Tr. 40).
the power had been deenergized, locked out, or blocked agains
ovement, the accident would not have occurred. Caillouette and
ave Cummings said it was routine practice to start the conveyor
lt by using a pipe wrench on the tail pulley without turning o
e power (Tr. 41). The inspector felt this was an S & S violat
r. 42). Further, in his opinion the negligence was high (Tr.
wever, the foreman stated he had instructed the men not to hav
e power on when they tried to start the equipment (Tr. 43).

Respondent is a three-man sand and gravel operation (Tr. 44
e foreman, who was cooperative, immediately abated the violatic
r. 45, 47).

The belt stopped because Caillouette placed an excessive
ount of material on it (Tr. 51).

David Cummings and Veigh Cummings testified for respondent.

David Cummings runs the company and does the excavation work

Mr. Caillouette, 37 years old, worked for Timber Lakes abo
and a half years (Tr. 76, 77, 79, 80). He was experienced
ng mechanical work and also works in the pit. On the day of
ident the County had been hauling gravel out of the pit all
. 77, 79).

Cummings talked to Caillouette the morning after the accid
explained that when the belt stopped he left the power on an
ed to restart it with a cheater pipe. Cummings did not see
ible signs of injury on the worker (Tr. 78). However, he di
tle complaining; he also worked the next full day.

The company has a strict rule prohibiting anyone from work
equipment with power on. The company's practice is to clean
n a problem with the power off (Tr. 80). Using a pipe wrench
s not solve the problem because the buildup remains (Tr. 80).

The company has made it clear to its employees that they do
work alone. Hard hats are available on the property (Tr. 82
y are required to be worn.

The witness did not file a report of the accident. The
ations were abated (Tr. 83). The pit has two or three worker
t of the time (Tr. 84).

One of the operator's complaints is that the company will
e the pit in good shape with one inspector. But another
pector will cite the company for a violation previously passe
r (Tr. 84, 85).

Caillouette stated to the witness that he was wearing a har
at the time of the accident (Tr. 86). Caillouette was very
kless in the way he handled the situation. He should have fi
ned the power off before cleaning it out with a shovel (Tr. 8

Caillouette was hurt on a Wednesday and he received a drunk
ving citation on Friday. But he was a good, hard worker
. 90).

The number of workers at the gravel pit varies from two to
e (Tr. 93). The gravel is used in the company's cabin develo
t and some is sold to the County.

About 10,000 tons are crushed annually (Tr. 94).

seen Caillouette go in by himself without turning off the p
(Tr. 100). Caillouette was also wearing a hard hat that mo
The next morning he said he got a bump on the head but it w
serious (Tr. 102). The witness told Caillouette he had don
foolish thing (Tr. 103).

Veigh Cummings, the President and owner of Timber Lake
indicated Ray Caillouette had been shot in the head in Viet
When he was injured at the pit it affected his previous war
(Tr. 115).

The company felt that Caillouette was a willing worker
(Tr. 116).

The payment of a penalty would not make it impossible
company to continue in business. The company holds safety
(Tr. 117).

The company has also received previous MSHA citations.

Evaluation of the Evidence

MSHA Inspector White indicated that the operator did n
report Ray Caillouette's accident. The event was known to
company. Further, David Cummings confirmed that no report
filed. Citation No. 2644388 should be affirmed.

The three remaining citations are mainly based on the
statement of Caillouette to the MSHA inspector.

Concerning Citation No. 2644389 (working alone): the s
of Caillouette confirms that the employee was, in fact, wor
alone. David Cummings, the foreman, had gone to Salt Lake
supplies. The company's claim that it had a strict policy
employees working alone was certainly not followed.

Citation No. 2644389 should be affirmed.

Concerning Citation No. 2644390 (hard hats): the state
of Caillouette was to the effect that he was not wearing a
hat. However, I credit the contrary evidence of David Cumm
and Veigh Cummings. Hard hats were available and Caillouet
even hunted deer while wearing one. This evidence indicate
dedication to the use of hard hats.

Citation No. 2644390 should be vacated.

The final citation, No. 2644391, involves the failure t
off power or block off machinery against motion. The statem
Caillouette establishes the violative condition, and it is a
that the accident would not have happened if the power had b
shut off. Cummings stated that Caillouette's acts were agai
company policy. However, the operator is strictly liable fo
violations of the Mine Act. Asarco, Incorporated-Northweste
Mining Department, 8 FMSHRC 1632 (1986).

Citation No. 2644391 should be affirmed.

An issue raised by respondent concerns the fact that on
MSHA inspector will give respondent a "clean bill of health."
But a later inspector will cite the company for a previously
existing violation. Events of this type can occur because MS
inspectors have varying degrees of expertise. A violative co
dition may be observed by one inspector but not another. Fu
the legal defense of estoppel does not lie against MSHA in th
circumstances, Servtex Materials Company, 5 FMSHRC 1359, 136
(1983).

CIVIL PENALTIES

The statutory criteria for assessing a civil penalty is
tained in Section 110(i) of the Act, now 30 U.S.C. § 820(i).
provides as follows:

> (i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achiev rapid compliance after notification of a violation.

Concerning the operator's history of prior violations it
appears the company was assessed 10 violations for the two ye
ending May 5, 1986. But no dollar amount has ever been asses
or been paid. Accordingly, I consider that the operator has

foreman should have known Caillouette would be alone if he site. The company's negligence is low in the last two cita Caillouette's activities were contrary to company policy. assessment of a civil penalty, according to the President, affect the company's ability to continue in business. The of the violations is high inasmuch as severe injury could Finally, the company demonstrated good faith in rapidly aba violations.

In view of the statutory criteria, I consider that the penalties set forth in the order of this decision are appro

Conclusions of Law

Based on the entire record and the factual findings ma the narrative portion of this decision, I enter the follow conclusions of law.

1. The Commission has jurisdiction to decide this cas

2. Respondent violated 30 C.F.R. § 50.20 and Citation No. 2644388 should be affirmed.

3. Respondent violated 30 C.F.R. § 56.18020 and Cita No. 2644389 should be affirmed.

4. Respondent did not violate 30 C.F.R. § 56.15002 a Citation No. 2644390 should be vacated.

5. Respondent violated 30 C.F.R. § 56.14029 and Cita No. 2644391 should be affirmed.

Based on the findings of fact and conclusions of law the following:

ORDER

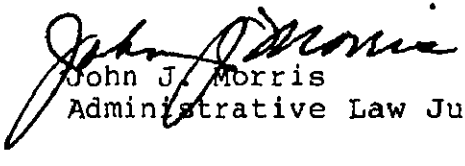
1. Citation No. 2644388 is affirmed and a penalty of $5
sessed.

2. Citation No. 2644389 is affirmed and a penalty of $3
sessed.

3. Citation No. 2644390 and all penalties therefor are
cated.

4. Citation No. 2644391 is affirmed and a penalty of $4
sessed.

5. Respondent is ordered to pay to the Secretary the su
750 within 40 days of the date of this decision.



John J. Morris
Administrative Law Judge

istribution:

argaret A. Miller, Esq., Office of the Solicitor, U.S. Depar
f Labor, 1585 Federal Building, 1961 Stout Street, Denver, C
0294 (Certified Mail)

r. Veigh Cummings, President, Timber Lakes Corporation, 4609
tate Street, Murray, UT 84109 (Certified Mail)

ot

September 25, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF BRYANT M. HATFIELD, JR., Complainant	:	DISCRIMINATION PROCEEDING Docket No. WEVA 87-156-D HOPE CD-87-5 No. 1 Mine
v.	:	
SMITH BROTHERS CONSTRUCTION, INC., Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

This is a discrimination proceeding arising under section 105(c) of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 815(c). On March 30, 1987, the Secretary of Labor, on behalf of the complainant, Bryant M. Hatfield, Jr., filed th complaint alleging violations of section 105(c)(1) of the Act. 30 U.S.C. § 815(c)(1).

The Secretary's complaint alleged inter alia, that the Com plainant was illegally discriminated against, on or about December 16, 1986, when a foreman employed by the Respondent threatened him with physical harm because of complaints Mr. Hatfield expressed, or intended to express, concerning preshift belt examinations at Respondent's No. 1 Mine.

On August 5, 1987, the Secretary and the Respondent, Smith Brothers Construction, Inc., filed a joint motion to approve settlement for the violations involved in this case. The Com- plainant has signed a separate notice evidencing his approval o the settlement agreement.

The joint motion to approve the settlement provides, in relevant part:

> Smith Brothers construction, Inc., admits that Bryant M. Hatfield, Jr., was illegally discriminated against, in violation of Sec-

December 16, 1986 when a foreman employed by Smith Brothers Construction, Inc., threatened Mr. Hatfield with physical harm because of complaints Mr. Hatfield had made, or was intending to make, concerning preshift belt examinations at Respondent's No. 1 mine.

* * * * * *

Smith Brothers Construction, Inc., agrees to remove from Mr. Hatfield's employment records all adverse remarks about his having exercised his statutory right to file or make complaints alleging dangers on safety or health violations under the Act.

Smith Brothers Construction, Inc., agrees to pay a civil penalty of $200.00 for its violation of Section 105(c) of the Act. This penalty is reasonable under the criteria set forth at Section 110(i) of the Act and will serve to effect the intent and purposes of the Act. The amount of this penalty is appropriate to the size of the business and the history of previous violations. The Respondent displayed a moderate degree of negligence in failing to prevent interference with Mr. Hatfield's exercise of his statutory rights. Respondent's management assigned extra duties to its foremen because of complaints made by Mr. Hatfield, but no precautions had been taken to protect Mr. Hatfield's rights in this potentially volatile situation. Although Mr. Hatfield was not intimidated by the threat made by Respondent's foreman, it is reasonably likely that the four other miners who were present when this threat was made would be deterred from exercising their right to make or file complaints because of this action on the part of Respondent. Good faith was demonstrated by the foreman's subsequent verbal apology to Mr. Hatfield, and by the Respondent's decision not to arouse further animosity by contesting this matter. There has been no assertion by the Respondent that its continued ability to conduct business would be threatened by the payment of a civil penalty in this case.

ettlement is GRANTED and the Operator is [illegible]
thin 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

stribution:

nald E. Gurka, Esq., Office of the Solicitor, U. S. Depar
Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 2
ertified Mail)

. Bryant M. Hatfield, Jr., General Delivery, Delbarton, W
670 (Certified Mail)

. Sidney R. Young, Jr., President, Smith Brothers Constru
c., P. O. Box 1518, Williamson, WV 25661 (Certified Mai

. Richard C. Cooper, UMWA, P. O. Box 839, Logan, WV 2560
ertified Mail)

1

5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SEP 28 1987

WESTMORELAND COAL COMPANY Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. HOPE 78-23 Order No. 1 FTC; 2/10
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Hampton No. 4 Mine
AND	:	
UNITED MINE WORKERS OF AMERICA (UMWA), Intervenor	:	

ORDER LIFTING STAY AND DISMISSING PROCEEDINGS

Contestant requests approval to withdraw its Conte the captioned case based upon an agreement between Cont and Respondent captioned "Statement of Modification and Agreement and Motion to Dismiss" filed by Respondent on August 11, 1987. The Intervenor has not filed any obje to the requested withdrawal.

Under the circumstances herein, permission to with is granted. 29 CFR § 2700.11. The Stay Order previous issued is accordingly now lifted and the case is theref dismissed.

Gary Melick
Administrative Law Judge
(703) 756-6261

ry Lu Jordon, Esq., United Mine Workers of America, 900
th St., N.W., Washington, D.C. 20005 (Certified Mail)

mes Crawford, Esq., U.S. Department of Labor, Office of the
licitor, 4015 Wilson Blvd., Arlington, VA 22203
ertified Mail)

t

RICHARD W. PETERS, DBA, Complainant	:	DISCRIMINATION PROCEEDIN
	:	Docket No. LAKE 87-37-D
v.	:	
	:	MORG CD 86-19
BUCKEYE INDUSTRIAL MINING COMPANY, INC., Respondent	:	

DECISION

Appearances: Richard W. Peters, East Palestine, Ohio, pro
John Orr Beck, Esq., Lisbon, Ohio, for Respon

Before: Judge Maurer

This case is before me upon the Complaint of Discrimin filed by Richard W. Peters under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging that Buckeye Industrial Mining Company discriminated against him in employment after he ha an accident on the job by returning him to work as a labore at a reduced wage from that of a truck driver, which he was prior to the accident.

The case was heard in Pittsburgh, Pennsylvania, on July 6, 1987. Both parties waived the filing of post-hearir briefs.

The parties have stipulated that:

1. Complainant has been an employee of the company sin October 22, 1968.

2. During his employment, he has been employed as a laborer, pitman, "2400" dragline operator, truck driver, and for short periods as a bulldozer and highlift operator.

3. On July 14, 1986, complainant was involved in an accident on the job when the truck he was driving rolled ove

4. Following that accident, complainant was off work until on or about July 21, 1986, and then was returned to work as a laborer and pitman at a reduced wage (70¢ per hour less) from that of a truck driver.

3. Complainant worked as a [illegible] 1986. At that time he allegedly hurt his back on the job and has been off work from the date of that injury until at least the date of the hearing (July 6, 1987).

The essence of this pro se complaint is that the respondent allegedly put the complainant in a lower-paying job on or about July 21, 1986, in violation of Section 105(c)(1) of the Act 1/ in retaliation for him having the accident a week earlier, and for making repeated safety complaints about the brakes on the truck he was assigned to drive. The complainant further alleges that it was these faulty brakes that in fact caused the accident.

The general principles governing analysis of discriminatio cases under the Act are well settled. In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of proof in establis ing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolid tion Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinett v. United Castle Coal Co., 3 FMSHRC 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983)(specifically approving the Commission's Pasula Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983)(approving nearly identical test under National Labor Relations Act).

1/ Section 105(c)(1) of the Act provides in pertinent part as follows: "No person shall discharge or in any manner discrimi nate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner...in any coal or other mine subject t this Act because such miner...has filed or made a complaint un der or related to this Act, including a complaint notifying th operator or the operator's agent...of an alleged danger or

There is no question that Mr. Peters engaged in protecte activity by repeatedly complaining to his foreman, Art Brown, about what he believed to be faulty and dangerous brakes on t truck he was assigned to drive. He made numerous complaints about the state of the brakes on his assigned truck in the tw or three weeks prior to the accident. Each time his foreman would call maintenance and one of the mechanics would come ou and check them. When the mechanic would get there, there was invariably nothing the matter with the brakes. Foreman Brown and Peters both further testified that the driver of the truc on the other shift, one Gene Liber, never complained about th truck's brakes and in fact denied having any problem when specifically asked about the brakes by Brown or Peters. Neve theless, reading the record as a whole, I find that it is entirely possible that Peters was experiencing an intermitten problem with the truck's brakes, and, in fact, inadequate brakes may well have at least contributed to the July 14 acci- dent. Accordingly, Mr. Peters has established the first ele- ment of a prima facie case of discrimination, i.e., he has shown to my satisfaction that he did indeed engage in protecte activity.

Foreman Brown testified that in every event, in response to every complaint, even though he was beginning to wonder about Peters' complaints, he called maintenance and had the brakes checked out and they always checked okay. Peters concurs with this testimony in substantial part. I also find Brown's testimony credible to the effect that he never told Peters to operate the truck without brakes or with bad brakes, but rather told Peters that if the brakes were bad, "take it to the parking lot and park it". I therefore find that Mr. Peters has failed to establish the second element of a prima facie case, that is, he has not shown that the adverse action by the operator was motivated in any part by the pro- tected activity.

Even had Mr. Peters established a prima facie case herein I find that case rebutted by the operator's evidence of valid non-protected business reasons for the removal of Mr. Peters as an equipment operator. Mr. Robert J. Bacha testified that the only piece of equipment Peters was ever able to satisfac- torily operate for the company was a "2400" dragline, and that particular machine is no longer in use. Thereafter Peters was tried out as a highlift operator, bulldozer operator and, lastly, as an end dump operator (truck driver).

He had problems with operating the end dump truck inde- pendent of the July 14 accident as a result of which, accordin to Bacha, the company removed him from the truck driving job

unning some of the other equipment might also have been art of the reason he was re-assigned.

Specifically, I find the respondent's evidence credible o the effect that Peters was removed from his job as a ruck driver and re-assigned as a laborer due to his general ack of competence at running machinery. Therefore, the re-ssignment of Peters had a legitimate business-related and on-protected basis. Under the circumstances, the Complaint erein must be dismissed.

ORDER

The Complaint of Discrimination herein is dismissed.

Roy J. Maurer
Administrative Law Judge

istribution:

ichard W. Peters, Sr., 5215 Jimtown Road, East Palestine, H 44413 (Certified Mail)

ohn Orr Beck, Esq., 26 N. Park Avenue, Lisbon, OH 44432 Certified Mail)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 87-91 A. C. No. 01-00328-03623
v.	:	Bessie Mine
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Merlin

The parties have filed a joint motion to approve settlemer of the two violations involved in this case. The total of the originally assessed penalties was $272 and the total of the proposed settlements is $40.

The motion discusses the violations in light of the six st utory criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977. The subject citations were issu for violations of respirable dust standards. 30 C.F.R. § 70.100(a). Both violations were designated as significant an substantial on the citations. The parties represent that a re- duction from the original assessment is warranted because the employees who were working in the designated occupation were wearing personal protective equipment in the form of respirator The parties further represent that MSHA will modify the subject citations to delete the significant and substantial characterization.

The rationale of the proposed settlements is justified by Commission precedent. Under Consolidation Coal Company, 8 FMSH 890 (1986), aff'd, 824 F.2d 1071 (D.C. Cir. 1987), a rebuttable presumption exists that all respirable dust violations are sign icant and substantial. However this presumption may be rebutte by establishing that miners in the designated occupation were n exposed to the hazard posed by the excessive concentration of respirable dust. The Commission specifically noted that the use of personal protective equipment would satisfy this evidentiary requirement. Based upon the representations of the parties, thi appears to be a case where the presumption is rebutted.

In light of the fact that the miners in this case were wear
personal protective equipment, I find the violations were
erious and approve the proposed settlements. Accordingly,
notion to approve settlements is GRANTED and the operator is
RED TO PAY $40 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

ribution:

iam Lawson, Esq., Office of the Solicitor, U. S. Department
abor, Suite 201, 2015 Second Avenue North, Birmingham, AL
3 (Certified Mail)

ld D. Rice, Esq., Robert Stanley Morrow, Esq., Jim Walter
urces, Inc., Post Office Box C-79, Birmingham, AL 35283
tified Mail)

erald Reynolds, Esq., Jim Walter Corporation, P. O. Box
l, Tampa, FL 33622 (Certified Mail)

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 29, 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDIN
	:	Docket No. SE 87-95
	:	A. C. No. 01-01247-0376
v.	:	No. 4 Mine
JIM WALTER RESOURCES, INC., Respondent	:	
JIM WALTER RESOURCES, INC., Contestant	:	CONTEST PROCEEDING
	:	Docket No. SE 87-56-R
	:	Order No. 2810626; 2/4/
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	No. 4 Mine

DECISION APPROVING SETTLEMENT
ORDER TO PAY
ORDER OF DISMISSAL

Before: Judge Merlin

The parties have submitted a joint motion to approve s ments of the three violations involved in this case. The t of the originally assessed penalties was $2,600 and the tot the proposed settlements is $1,900.

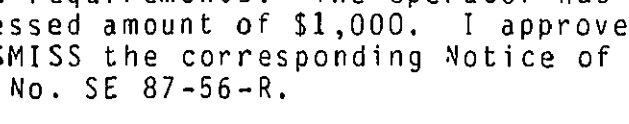
The motion discusses the violations in light of the si statutory criteria set forth in section 110(i) of the Feder Mine Safety and Health Act of 1977. Order No. 2811815 was for a violation of 30 C.F.R. § 75.1403-7K because an employ riding in the service cage while material was being transpo therein. This penalty was assessed at $500 and the propose settlement is for $350. The parties represent that a reduc from the original amount is warranted on the basis that gra

therefore would not easily slide across the floor of the ca
Thus, the likelihood of a resulting injury is not as great a
originally thought. I accept the foregoing representations
approve the recommended settlement.

Order No. 2810449 was issued for a violation of 30 C.F.
§ 75.200 because the approved roof control plan was not bei
complied with. The roof control plan requires that when ful
grouted resin rods are used, that they shall be installed w
8 hours after the coal is mined or loaded, or the area shal
supported with temporary supports. In this instance, the c
of the faces was concluded on the day shift at approximatel
p.m. The roof bolting machine then became disabled on the
evening shift and prevented the commencement of bolting
operations. The order was issued at approximately 1:00 a.m
the night shift. Once the roof bolting machine was repaire
operator bolted the No. 2 entry with resin pins and tempora
supported the No. 2 entry. This penalty was originally ass
at $1,100 and the proposed settlement is for $550. The par
represent that a reduction from the original amount is warr
because gravity is less than originally assessed in that th
remained intact, even after ten hours of cutting, which per
the proper installation of the resin bolts. I accept the f
going representations and approve the recommended settlemen

Order No. 2810626 was issued for a violation of 30 C.F
§ 75.303 because the operator failed to comply with pre-shi
on-shift inspection requirements. The operator has agreed
the originally assessed amount of $1,000. I approve this s
ment and hereby DISMISS the corresponding Notice of Contest
this order, Docket No. SE 87-56-R.

Accordingly, the joint motion to approve settlement is
APPROVED and the operator is ORDERED TO PAY $1,900 within 3
from the date of this decision.



Paul Merlin
Chief Administrative Law Judge

Distribution:

William Lawson, Esq., Office of the Solicitor, U. S. Depart
of Labor, Suite 201, 2015 Second Avenue North, Birmingham,
35203 (Certified Mail)

Harold D. Rice, Esq., Robert Stanley Morrow, Esq., Jim Walt